COMMERCIAL LAW

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DIRECTIONS TO STUDENT

COMMERCIAL LAW

EXAMINATION QUESTIONS

UNDER the heading "Examination Questions" at the end of each lesson is a series of test questions which are to be fully answered and sent in to our Instruction Department for correction and criticism. You are requested not to answer these questions until you have thoroughly mastered the contents of the lessons on which they are based.

After mastering the contents of the lesson and studying each question thoroughly, write out your answers to all the questions, as far as possible, without referring to the subject-matter of the lesson. In fact, we would strongly advise you under no circumstances to refer to the subject of the lesson when once you have set about to write your answers.

You will find it a good plan after you have written out your answers to check over your work in order to detect any errors. Then rewrite your answers (using pen and ink), being very careful of your penmanship, spelling, and composition.

Any written answer should be introduced in a manner that will connect it definitely with the question, and so indicate clearly what is being discussed. Neither an examiner nor an executive would pay much attention to written material if this is overlooked.

Avoid the use of pronouns and demonstrative adjectives except when they are preceded by the nouns to which they refer.

Make your answers complete but concise. Get down to the roots of the question. Don't skim over the material involved in the answer.

Prepare papers for sending in as follows: Rule a margin of one inch at the left edge of the paper if the stationery you are using has not a margin already ruled. Arrange your answers in consecutive order, corresponding to that of the questions. *Leave two lines blank after each answer.* Write on one side of the paper only, numbering each page at the top in the right-hand corner. Write your name, the subject, and the number of the examination at the head of the first sheet.

If green slips are attached to the papers (as they should be), fill these in as directed at the bottom of the slip. In case any lesson is sent in without the green slip attached, prepare the heading of the page as follows—

1. Name ..... 4. Subject .....

2. Address ..... 5. Exam. No. .....

..... 6. Percentage .....

3. Class Letter and No. ..... 7. Instructor .....

(Student must fill in Lines 1, 2, 3, 4, and 5. Instructor will fill in Lines 6 and 7.)

COMMERCIAL LAW

Lesson 1

INTRODUCTION

Necessity of Rules of Conduct

1. Wherever we find people gathered together we find that they are able to live without clashing only by following some well-understood system of rules. Take a look out of the window at the people passing up and down on the sidewalk. You seldom, if ever, see one person run into another. Why is it? Oh, you say, any one knows enough to keep to the right in passing. Might they not just as easily pass up and down if every one turned to the left? Yes, but that is not the rule with us, and so in the very simple matter of passing people on the street we must see to it that we know the rule by which we are to be governed.

Different Countries Have Different Rules

2. What is the rule in one country is not always the rule in another. In Canada, for instance, people in driving along the road generally follow the same rule in passing as they do on the sidewalk. If you should be driving along a road in England you would, in passing vehicles, keep to the left. In other words, the rule of the road is not the same in Canada as in England—and so, wherever we are, we must be careful to know and to observe the rules in force in that particular place.

Different Kinds of Rules

3. These rules, by which we govern our actions, are of different kinds. The young man who refuses to take off his hat to ladies of his acquaintance, in passing them, soon learns that society has its rules. The person who sits in the draught will soon learn that if we would avoid sickness there are rules of health to be observed. The man who forges his neighbour's name to a note learns that he transgresses a rule he should have observed regarding his neighbour's rights. In fact, it would appear that everything we do is done, if properly done, according to rules. A large number of these rules we have learned so long ago that we never think in doing a great many things that we are acting in obedience to rules. The habit has become second nature to us. Others we have to learn as circumstances arise that bring us into contact with people.

4. This we know is as it should be. Order is Heaven's first law. If there were no rules, no order, no system in our actions, there would be no proper living and no advancement. We would be little better than the beasts or savages. If we are rightly constituted, system and order always appeal to us. Look at the crowds of people a military parade attracts. How the uniforms, the regular marching, and the well-executed movements win approval. How many people, do you think, would turn out to see the same number of men just straggle down the street as a mob?

Reasonableness of Rules of Conduct

5. There is nothing irksome in doing things systematically, at least there should not be. The good soldier should take as much pride in his drill as the onlookers get pleasure in watching him. Let us always bear in mind that to be successful in life our lives must be well ordered. No man is a law unto himself. The mightiest man who walks the earth must acknowledge the presence and the power of rules of action. There is no surer sign of a wrong state of mind than a feeling that all system and order in doing things are intolerable. The man who would turn things upside down, have no law, no order, is a fool. There is no real freedom in licence.

6. Let us then take the wise view of the matter. Let us get an acquaintance with the rules of health, that we may get that enjoyment of life which comes from good health. If we wish to know people and to get the pleasure of their society, let us not scorn the rules of society. As all of us are more or less business men and women, let us get an acquaintance with the rules of business. When we learn the necessity of this we have made the first step in the study of law, for law is a rule of action—and no real appreciation of the value of the study of law can come without an appreciation of its use and its importance in properly conducting ourselves.

LAW IN GENERAL

"Law" in Its Widest Sense

7. Giving the term "Law" its widest meaning, it signifies a rule of action. If we were to attempt to study law in this wide sense, it would lead us into a large number of fields of thought. There are moral laws, the laws of Nature, the laws of science, the laws of the land, and a number of others that we could mention, until we begin to understand that wherever we find students—whether in schools of theology, science, law, or business—they are, in one sense, all students of law.

"Law" in Its Limited Sense

8. There is a more limited sense in which we use the term "Law". One man kills another and we say that he has broken the law. Again we often hear a man who has suffered some injury at the hands of his neighbour say "I'll have the law on him". In either case we all know what is meant, even if we have never paused to put our ideas of the word "Law" into a straight definition. We know that in our intercourse with our neighbours there are things we must do, and things we must not do. We must carry out all agreements by which we bind ourselves. We cannot borrow money today, promise to pay it back in a week, and laugh at the man who obliged us when he attempts to collect his money. We must not trespass on our neighbour's property. We know that there is an authority which says "Thou shalt" and "Thou shalt not", and, if we disregard its commands, there are courts of law before which we can be made to answer for our neglect. In other words, there is a sense in which the word represents to us *a system of rules laid down by the supreme power in a country, which system regulates the intercourse of the people of that country with one another.* This law, to distinguish it from other kinds of law, we call Municipal Law, and it is this we have in mind when we say a man is studying law. The term "Municipal Law" is not restricted to the laws governing the smaller divisions of the larger municipal area which are referred to as municipalities.

Necessity of Law

9. Could we imagine a man cast away on an island, of which he was the sole inhabitant, there would be for him none of this kind of law. Other laws would have their effects. As one of God's creatures, God's law—the moral law—would be just as binding on him as if he lived in a crowded city. The laws of Nature and the laws of science would always be manifest to him through their workings; but for laws which regulate his actions towards his neighbours there could be no need—he has no neighbours. Let a single person be added to the population of the island, however, and there is a change of conditions. To get along peacefully, these men must come to an agreement as to their rights and privileges. Some of the points of this agreement their past experience will dictate to them; others will be settled only after something has happened calling for argument and adjustment. In this they are simply forming laws for themselves, and if all their agreements were entered in a book it might be called the law of that island. If any other people came there they would have to make their actions conform to that law. It might be that they had been subject to different rules where they came from, but having come to that place they must conform to its rules if they want to remain there.

CANADIAN LAW

Canadian People Make Canadian Laws

10. Now that we know what we mean when we speak of the Law —that body of rules laid down by the supreme power in a country for the regulation of the intercourse of its inhabitants—it would be well for us to know who possesses this supreme power. Know then that in Canada the people are supreme. The people make the laws. Every person in Canada of the age of twenty-one is, in a sense, a law-maker. Let us learn that important fact—for in many minds we find a very different notion prevailing. How many people there are who have the idea that all laws are simply rules devised by other people for their annoyance. How many times we hear people railing at the Government as if it were a dragon in whose clutches they were helpless. As Canadians we should be proud to know that this is not the case. There may be countries where people are little better than slaves and have laws forced upon them which may transgress all principles of right, but in Canada the people make the laws. True, someone may say that a certain law is not as he would have it, but it must be as the majority would have it.

Dominion Parliament and Provincial Legislature

11. How then does every Canadian get a share in making Canadian laws? By his vote. It would be impossible for several millions of people to get together and devise rules of conduct for the whole Dominion, so the whole country is divided into sections as it were, each section containing a certain number of inhabitants. These people are called upon, once every five years or less as the Government may determine, to send representatives to a common meeting place—Ottawa—to express their views. When these representatives get together they make up the House of Commons and with the Governor-General (representing the Sovereign) and the Senate (the members of which are appointed for life on the recommendation of the Governor-in-Council, i.e. the Dominion Cabinet) constitute the Parliament of Canada. Year after year Parliament meets as new conditions are continually arising throughout the Dominion and new laws must be made to meet them.

It will be observed then that the people exercise their power in law-making when they vote to elect representatives to speak and act for them. This is true whether they are electing members to the House of Commons at Ottawa, or to the Provincial Legislature, or to the council of a municipality.

The Provincial Legislature is composed of representatives elected by the people in various districts throughout the province together

with the Lieutenant-Governor who occupies in the province a position similar to that of the Governor-General in the Dominion. In the Province of Quebec there is also a Legislative Council which corresponds in many respects to the Senate in the Dominion.

Statutory Law

12. Whenever a member rises in the House of Commons or Provincial Legislature to explain a certain rule which he thinks should be made law, it is the same as if all the people in his section were speaking. Another member gives his opinion on the subject and it is simply another section of the people speaking. Full chance is given for all to speak and then a vote is taken. Of course, it is not expected in every case that every one will be satisfied with the proposed law, but the majority must rule, and if the majority is in favour of the proposal and vote accordingly, it becomes law. Such laws are known as Statutes. From this it will be quite clear that all laws passed by Parliament or Legislature are called Statutory Laws.

Common Law

13. The majority of the early settlers in Canada came from Great Britain and Ireland. Naturally, then, our ideas of laws and law-making are largely of British origin. In fact, we have among our statutes, laws that are simply English laws adapted to our uses. If we trace the history of England back far enough we come to times when regular parliaments were unknown. Still, people in those times knew that they had rights to be respected and that they were above living without any rule or system. So we find that in these early times certain rules began to be observed, and customs and usages began to have a binding force. In this way laws were being gradually formed out of commonly observed rules, which laws are known as the Common Law of England, and in adopting a number of their laws we have also taken largely from this common law. This law is sometimes called our unwritten law for, unlike our statutory law, it never had origin in the written statement of a law as passed by Parliament or Legislature. Common Law is based on court decisions which have recognized these commonly-observed rules and so is known also as "Case Law". Our laws then are according to origin either Common or Statutory.

The Statutory Law we get from Parliament or Provincial Legislature. To understand this feature it is necessary to recall a few facts concerning our Canadian history. When by the British North America Act of 1867 the provinces were united as the Dominion of Canada, each province had its own legislature. Of course it became necessary to have one general Parliament to look after the interests of the com-

bined provinces at large, and thus our Dominion Parliament was formed. This did not do away with the legislatures of the different provinces. It simply made it necessary to divide the work of law-making.

To the Dominion Parliament was given the power to make laws concerning such matters as the postal service, the founding of banks, the issuing of money, the regulation of weights and measures, the issuing of patents, and a number of other things that must be arranged so as to affect all people in the Dominion alike, no matter in what province they may reside.

To the Provincial Legislatures was given the power to make laws concerning matters of a local or private nature in the Provinces, such as education, the appointment and payment of provincial officers, the sale of lands and timber belonging to the provinces, the establishment of asylums and hospitals, the issuing of licences, and laws governing property and civil rights, etc.

Consequently we have Dominion Statutes and Provincial Statutes, but they do not conflict as each legislates in matters within its own jurisdiction.

The Courts are frequently compelled, however, to interpret certain sections of the British North America Act where it is uncertain as to whether the subject-matter is within the jurisdiction of the Dominion or of the Provinces as, for instance, insurance.

COMMERCIAL LAW

Revised Statutes

14. From this knowledge of what we mean by law and whence we derive it, we can easily see that as often as occasions arise to bring people into contact, just so often will be needed laws to regulate their intercourse—unless the principles laid down in previous and similar cases serve as a guide. Not a year goes by without some new condition arising that affects the relationships among the people. For instance, there was a time in Canada when we needed no railway laws, for the very simple reason that there were no railways. The very minute men undertook to build and operate a railway, that very minute there arose the necessity for laws concerning railways. The necessity for railway laws did not cease with the passing of the first bill. Each year sees something added to the law in this respect. This is true with regard to other laws. The laws respecting Motor Vehicles on the Highways, and By-Laws passed by any Municipality regarding the

parking of cars are subject to frequent changes to meet conditions as they materialize.

Changes in the form of substitutions or additions are constantly being made in existing laws. These changes in our statutory laws are termed "amendments". Suppose a law relating to a certain subject was passed in the year 1946 and that in each of the following six years amendments were passed pertaining to that same subject. Each amendment is in the form of a separate statute. It is evident then that after six years there are seven statutes relating to that one subject. This makes the law relating to that subject rather confusing. It will be necessary then to make a revision of the law relating to that subject by bringing all points together, fully corrected and in a convenient form, for reference. This is done by passing a new statute relating to that branch of the law and including as much as is desired from the seven statutes previously passed, with any additions considered necessary. The seven statutes are then repealed and the new statute is referred to as a revised statute.

The same practice will be applied to other subjects in law when revisions are considered necessary, and when the revision is applied to the laws in general, say of a province, and they are published together, they are termed The Revised Statutes of the Province of ——. The Criminal Code of Canada or other Dominion statutes may be treated in a manner similar to that outlined.

It should be clearly understood that when a statute is revised, the new statute takes the place of the various statutes that had been passed previously relating to that particular subject.

Commercial Law

15. From the foregoing it will be readily understood how we get the habit of speaking of our laws according to the subject-matter with which they deal. We speak of our Railway Laws and our Fishery Laws. In the same way, when we want to speak of the laws which govern men in all the intercourse which ordinary business trade and commerce make necessary, we use the term Commercial Law.

Points Dealt with in Commercial Law

16. To understand the points dealt with by Commercial Law, it is only necessary to think of the circumstances that bring people together in a business way. Let us run over a few of them. Two men want to join hands in conducting a dry-goods business. They agree to become partners. They want to get the use of a certain store. They agree, as partners, with its owners to lease it for a period of years. They want to put their money in safe-keeping and they agree with a certain bank

to keep an account in that bank. They want goods to stock their store. They agree with a wholesaler to take a quantity of goods and to pay for them in a certain way. They want clerks to work for them. They agree with certain salesmen to accept their services and to pay for them at a certain rate. These are a few examples among many that involve business contracts. Every move they make in a business way brings them in contact with different people in different ways. They must be clear on points concerning the formation of partnerships, the leasing of property, the transacting of business with the bank, the buying and selling of goods, the hiring of help, and a number of other things all of which demand a knowledge of the laws on these points. The law on these points will not be found in one statute, nor even in all the statutes. Many statutes, together with the Common Law, would have to be consulted, and the combined information gleaned from all is spoken of as Commercial Law or the Laws of Business.

Necessity of Knowledge of Law

17. Every person should have some acquaintance with the laws of business because, to a certain extent, we are all business men or women. The farmer, the mechanic, and the professional man have more or less business to transact every day and should have some idea of the laws by which they are governed. In saying this we do not wish it to be understood that every man may become his own lawyer by getting a fair knowledge of Commercial Law. A man may know how to stop the bleeding of a cut without imagining himself a surgeon. You are very wise in studying medicine to the extent of knowing how to look after yourself should a simple cold settle upon you, but very foolish if you imagine you do not need a doctor's assistance in a case of pneumonia. So it is with Commercial Law. If you have to sign a note, endorse a paper, hire a man, or do any one of the countless things that are daily coming up in business life, you want to know your business law on such subjects. Even a lawyer would be inclined to laugh at a client who ran to him for information as to his position should he endorse a note or sign a contract.

18. In our work, therefore, we are going to touch upon such points as should be known to every business man, with the understanding that, in more intricate cases, the advice of a lawyer should always be sought. I can draw up my own notes and cheques; I would just as soon have my lawyer draw up my mortgages.

Examination Questions

COMMERCIAL LAW

Lesson 1

1. What is Law? By discussion, including a reference to different phases of law, apply the term "law" in its broadest sense. Are all laws subject to the control of man?
2. What is Municipal Law? Apply the term in its broad sense.
3. With whom does the supreme power in Canada really rest?
4. How is the supreme power exercised in law making?
5. What constitutes the Parliament of Canada?
6. What constitutes a Provincial Legislature?
7. Outline the scope of each (Parliament and Legislature) in the matter of law making? Illustrate your answer by submitting examples.
8. Define Statutory Law.
9. By discussion, express the significance of the term "Common Law".
10. What are the Revised Statutes of your province? State clearly what is involved in the revision of statutes.
11. Explain what is meant by Commercial Law.
12. Name some of the points usually dealt with under the heading of Commercial Law.

COMMERCIAL LAW

Lesson 2

CONTRACTS

What is Business?

1. In commencing a study of Commercial Law, the question that naturally presents itself is:—What is business? Someone has defined business as "an exchanging of values". I make a bargain with a newsboy to bring an evening paper to my door every evening for a month for 80 cents. It is a business transaction just as much as is a bargain whereby one person sells to another a business block for $250,000.00.

Doing Business Involves Making Contracts

2. Whether the amount concerned be small or large, the idea in all business transactions seems to be the same. What one person has another wants, not in a covetous sense but because it is necessary to him, and he is willing to give something in return for it. The exchanging of values cannot be effected as a general rule unless there is a meeting of the parties concerned, a talking over of the matter, the striking of a bargain, and then the exchanging of the values. In other words, business is largely a matter of bargains, or agreements, or contracts, and business law is therefore very largely a matter of the law of contracts.

Contract Defined

3. Keeping in mind our familiar idea of a contract as a bargain or an agreement, we have no difficulty in understanding the legal definition of a contract.

A contract is an agreement, enforceable by law, between two or more persons, upon sufficient consideration, to do or not to do some particular thing.

Notice the idea of business or exchange in the definition. There is a bargain or agreement to do something upon sufficient consideration, that is, something must be given in exchange for something done. I sell a man a house on consideration of getting $5,000.00 in return. I give a man my services for a year on consideration of getting from him $2,000.00, or I may give up my right to do something I am at

liberty to do on consideration of some value received. Of course, all through our work we will be concerned largely with the positive side of the question, or with those contracts which represent agreements to do some particular thing.

Kinds of Contract

4. As we are to be so much concerned with contracts, it is only right that we should at the outset become acquainted with terms that are used in speaking of them. Suppose you ask three different persons to describe a certain man. One says he is a tall man, the second says he is a stout man, while the third says he is a fair man. All statements are different and yet all are correct—it is simply a matter of the point of view. The same is true with contracts—there are different ways in which we may view them and, accordingly, there are different terms used in describing them. The following table will give a list of these terms—

Terms used in speaking of a contract as to the way in which its points are set forth.	1. Special. 2. Parol or Simple.
Terms used in speaking of a contract as to the way in which we know what the different points of agreement are.	1. Express. 2. Implied.
Terms used in speaking of a contract as to its completeness or incompleteness at a given time.	1. Executed. 2. Executory.
Terms used in speaking of a contract as to its binding effect on the parties to it.	1. Valid. 2. Void. 3. Voidable.

Special and Parol or Simple Contracts

5. The most solemn and binding contract into which we may enter is the Special or Specialty Contract. This is a contract, the terms of which are all set forth clearly on paper. It is then signed by the different parties, and a seal is placed after each signature. The instrument is then delivered or handed over to the party in whose favour it is to operate. Mortgages and Deeds are contracts of this class.

The voluntary delivery of the contract is a vital factor. No written contract is complete until there is a voluntary delivery of it to the party or parties in whose favour it is made. Suppose, for example, that A signed a contract in favour of B and that B went into A's office when A was absent, picked up the contract, and took it away without A's consent. The contract is not binding. A must deliver the contract to B, i.e. hand it to him or tell him to take it.

All contracts except Special or Specialty Contracts are termed Parol or Simple Contracts, and it is with this class that Commercial Law is concerned chiefly as business is largely done through contracts made by word of mouth, or by placing the terms on paper and getting the signatures of the parties without their seals. It will thus be seen that while the sealing of a document very often amounts to no more than the placing of a gummed wafer after the name, it has an important meaning in law. It shows that due deliberation has been exercised and that the parties are aware of the solemn nature of the agreement to which they have placed their names. A man does not, for instance, place a mortgage for a thousand dollars on a house that he owns in the same off-hand way that he orders a ton of coal delivered to his house. The money and the coal are both secured as the outcome of the making of a contract—the money by a Special Contract, and the coal by a Simple Contract.

If action is taken to enforce a Special Contract, *it is not necessary* to prove consideration as consideration is implied by the seal.

To enforce a Parol or Simple Contract *it is necessary* to prove consideration.

A Parol or Simple Contract may be in writing and signed but without seal, or oral, or implied.

Express and Implied Contracts

6. In an Express Contract, whether made orally or by written agreement, all the points of the agreement are clearly set forth. For instance, a man goes to his grocer and leaves an order for certain goods to be delivered to his house. He gives, item by item, a list of the goods he wants. The grocer gives him the several prices and the total of the bill. It is arranged that the goods are to be delivered at a certain time and to be paid for in a certain way. In short, every point in the agreement has been talked over and settled. Such a contract is called an Express Contract. The word "express" in this connection means clear, plain, or fully stated.

On the other hand, it very often happens that the order is left without any arrangement being made as to the price. In other words, the contract is Express as to what goods the grocer is to supply, but Implied as to the price that is to be paid for them. It is implied that when a man orders goods he is ready to pay for them and it would be useless for him to argue that he is not liable for payment simply because he had made no agreement to pay. If we follow out this line of thought, we can see that some contracts are wholly implied. The man who gets on a street car makes no bargain for a ride. Not a

word need be exchanged between the conductor and himself. It is implied from the running of the cars that they are ready to receive passengers and, on the other hand, from the action of the passenger in boarding the car it is implied that he is ready to pay the fare. From these illustrations it will be seen that a contract may be wholly Express or wholly Implied, or partly Express and partly Implied.

Executed and Executory Contracts

7. If we view contracts as to their completeness or incompleteness at a certain time, we find another pair of terms used in describing them. For instance, a man goes into a store, selects a hat, puts it on, pays the price and walks away with his purchase. We speak of this as an Executed Contract—one that is fully complete and in which nothing remains to be done. If the man had bought his hat with a promise to pay for it in a week, the contract would be an Executory one, or one in which something remained to be done. Strictly speaking, the first of these is not a contract. It is not an agreement to do something, but an agreement carried out. There remains nothing to be done, and the contract is of interest to us only as defining the rights to which its carrying out gave rise. It is obvious that a contract may be executory for some time before it is finally executed.

Valid, Void and Voidable Contracts

8. There is still another light in which we may view contracts. We sometimes hear people say that a certain contract is not worth the paper on which it is written—that is, there is something wrong about the agreement which makes it of no binding effect on the parties. Two men could not make an enforceable agreement whereby one was to set fire to a neighbour's house in return for a sum of money paid to him by the other. Such a contract is Void, or of no binding effect on the parties to it. A Valid Contract is one which contains all the elements of a contract—one which the courts will enforce. It sometimes happens that the circumstances connected with the making of the agreement are such that it rests with one of the parties to declare the contract Valid or Void. We will see later in our work that a person under twenty-one years of age is, generally speaking, not considered competent to contract. The law does not say that all contracts to which he is a party are Void, but that it rests with him to say whether he will consider himself bound to his agreement, carry out his part of it, and require the other party to do the same or, on the other hand, plead his lack of years, refuse to carry out his agreement, and thus release the other party. Such contracts are Voidable, that is, they may be Valid or Void according to the decision of one party.

9. All the terms that we have defined should be thoroughly understood. They occur so often in speaking of contracts that, should we see or hear of one of them, the meaning at once should be clear to us.

COMPETENT PERSONS

Requisites of a Valid Contract

10. Some contracts are valid, that is, good and enforceable by law —others are void or, in other words, bad and not enforceable by law. How are we to know the one kind from the other? How does the chemist tell you whether or not the liquid in the bottle is really what the label says it is? He does so simply by applying certain tests to it. He does not just guess it is one thing, or say it looks like something. He tests it in a systematic way and thus determines what it is.

11. So it is with contracts. If a paper were placed before you, and you were asked to state whether or not the writing on it set forth a good contract, you must know your tests as it were. It will not do to look it over and say you think it is a good contract, or that it looks all right. You must know the tests of a good contract, look for these, and give your decision accordingly.

12. The tests or points necessary to a valid contract are, stated briefly, as follows—

(1) Competent persons.
(2) Mutual consent.
(3) Good or valuable consideration.
(4) A lawful object.

13. Keep in mind that a binding contract has four pillars of support. Get this short statement of them well in mind for, no matter what the peculiar contract under discussion may be, its strength depends on the presence of these features. All contracts are not alike. A Note has points that are not found in a Mortgage, a Bill of Sale is different from a Lease—but all of them must square to these requirements at least. Our study of any particular form of contract will always proceed from a knowledge of these four requisites.

Competent Persons

14. Now we must clothe our skeleton. First, what do we mean by Competent Persons? They are simply those whom we recognize as being able to make contracts binding on themselves, and enforceable at law. Some persons cannot do this but they are so few in number, compared with those who can, that we can best get our ideas of competent persons by setting aside those who are incompetent and understanding that, outside the few thus mentioned, all persons have the greatest possible liberty in contracting.

15. Those who are, by our laws, considered wholly or partially incapable of making binding contracts are—

1. Infants or Minors.
2. Indians.
3. Alien Enemies.
4. Corporations.
5. Married Women.
6. Lunatics.
7. Drunkards.
8. Idiots.

Note the reference to these in the sections that follow.

Infants or Minors

16. By Infants or Minors, at law, we understand those persons who are not of age. A person becomes of full age on the first moment of the day before his twenty-first birthday. Before that he is, as it were, under the special protection of the law, and has not the capacity of making a contract binding on himself. All contracts to which he is a party are voidable, except those for necessaries and certain contracts for the infant's benefit such as contracts of apprenticeship and employment.

17. Apart from these exceptions, at Common Law an infant's contracts are voidable at his option either before or after attaining his majority, but these voidable contracts are of two general classes.

(1) *Those valid and binding on the infant until he disaffirms them either during infancy or within a reasonable time after majority.* Examples of this class are contracts whereby an infant acquires an interest in permanent property to which obligations attach, or enters into a contract involving continuous rights and duties and takes some benefit under the contract. In these cases he will be bound unless he expressly disclaims the contract. Nothing short of express disclaimer will entitle a person on attaining his majority to be free of these obligations. Thus if an infant gives a Deed conveying land or an interest therein, or leases and occupies property, or holds himself out as a partner, or purchases shares in a company and receives some benefit therefrom, he will be bound by his contract unless he expressly disclaims it within a reasonable time after coming of age.

(2) *Contracts which are not binding on the infant until he ratifies them within a reasonable time after majority.* In the case of contracts that are not continuous in their operation, the infant is not bound unless he expressly ratifies them upon coming of age. Thus a promise to perform an isolated act such as to pay a reward for services rendered, or a contract which is wholly executory, and indeed all contracts other than continuing contracts or contracts for necessaries or for the infant's benefit, require an express ratification.

Minors who are self-supporting may enter into binding contracts for necessaries such as for board, education, and medical attendance.

If minors enter into any other contracts, they cannot be compelled to carry them out. In other words, to them the contract is voidable. On coming of age the minor may indicate his willingness to complete his part of the contract by a written statement to that effect, or by retaining the consideration he has received. The written promise waives the protection of the law. If he refuses to carry out the contract he must, if possible, return any consideration he has received.

18. In Quebec, a minor is freed from the disabilities of minority by marriage; by engaging in business as a banker, merchant, or mechanic; and may be freed also by the Court. In all such cases a curator or guardian must be appointed.

If the above has been put into effect the minor is said to be emancipated, that is, freed from disabilities, and he may grant leases for periods not exceeding nine years, and perform other acts of pure administration, and he may also be held liable on contracts in connection with his business or trade. However, he cannot sign as a witness to a will, nor make a will, nor act as executor to a will. He cannot enter or defend an action except for his own wages, nor borrow money without the aid of the guardian, nor give a mortgage or deed except under the order of a court, judge, or prothonotary.

Treaty Indians

19. Treaty Indians, in Canada, are simply wards or infants of the Crown, and are not capable of making binding contracts, even for necessaries. A contract to which a Treaty Indian is a party is a voidable contract.

Mentally Unsound Persons

20. An idiot is a person who never possessed a reasoning mind. He is not capable of binding himself in a contract.

21. The contract of a lunatic or drunken person is binding upon him, unless it can be shown that at the time of making the contract he was wholly incapable of understanding what he was doing and that the other party knew of his condition. A person who makes a contract while intoxicated may affirm the contract on recovering his senses. In Ontario, The Sale of Goods Act provides that where necessaries are sold and delivered to an infant or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor.

Alien Enemies

22. Alien enemies are the subjects of another country with which our own may be at war. The breaking out of war suspends all contracts that may be incomplete at the time, and prohibits the making of any new contracts so long as the war may last.

It should be observed that contracts which are suspended on the breaking out of war may be taken up again after peace is finally declared.

Corporations

23. Corporations are simply associations of persons who are granted charters by the Government to act as single individuals for the carrying on of any business. The Joint Stock Companies (Limited) which control our banks and many of our different business enterprises are examples of corporations. When a charter is thus granted to a corporation to engage in any line of business, it limits the operation of the company to the powers contained in the charter, and if it engages in any other business it is exceeding its powers. A bank, for instance, cannot engage in insurance business, and companies that are formed for trading and manufacturing purposes may not carry on the business of banking. All contracts, therefore, which are not in accord with the objects for which the company was formed are *ultra vires*, and therefore void because of the company's incapacity.

Married Women

24. Married women were, by the Common Law, incapable of making valid contracts as the husband and wife were deemed to be one person and the husband represented that person. Our statutes have since modified that state of affairs and a married woman may now freely contract with reference to her own property, or Separate Estate as it is called. This separate estate includes all that she owned before marriage, all gifts or legacies, all property coming to her as heir to any estate, and all earnings as profits from business conducted on her own account. (Quebec and Nova Scotia students should refer to Lesson 9, Sec. 26.)

Summary

25. From what we have just read, we gather the general idea that to make a Valid Contract, a person must be of sound mind and not under any legal disability. We can judge of fitness only by knowing the persons. The mere fact that a man's name appears at the bottom of a contract as one of the parties to it, or that we are told that he is one of the parties to it, will not enable us to apply our first test to the

validity of the contract. We must know the person, or have certain information about his fitness to contract.

MUTUAL CONSENT

Mutual Consent Defined

26. There is an old saying, "It takes two to make a bargain", which, if kept in mind, must always teach us that every contract has two sides to it. One person must offer something for the consideration of the other. If the offer is favourable, and the second person accepts it, we have a contract. The minds of the parties have met. They have become agreed on a certain point. This is what we mean by Mutual Consent—the second point necessary to a valid and binding contract. The parties to it must agree to the same thing in the same sense.

Proposition or Offer

27. Mutual consent or assent is, therefore, a matter of two elements: (1) A proposition or offer. (2) An acceptance. A says to B, "I will sell you this horse I am driving for $125.00". This is an offer. B looks the horse over and says, "I'll take him". This is an acceptance, and the contract is made. A must deliver the horse to B, and B must pay over the money to A.

28. Now this proposition or offer of A's could be made with one breath and taken back with the next. There is nothing binding on him to let B even get a chance to accept it. This would be quite as true if A had told B that he would give him a week to consider the matter. A is free to make the offer, and just as free to take it back. Should B, however, get in his acceptance before the withdrawal of the offer, A's right to withdraw is gone.

Acceptance

29. If the offer stands, the acceptance must be given in a reasonable time. If the parties are face to face and no time for consideration is mentioned, the acceptance must come before they separate. If a time is stated for which the offer is good, the acceptance, to be binding, must be made within this time. If the offer is made by letter, it is accepted as soon as the letter of acceptance is mailed. This last point is worthy of careful note, for sometimes one mail carries an offer and the next carries its withdrawal. If, before the letter of withdrawal reaches its destination, the acceptance has been mailed, the bargain is complete. It matters not what the first party can prove about the time he sent his second letter. If it is not in the hands of the other party before he mails his acceptance, the withdrawal amounts to nothing.

Securing an Option

30. To hold the proposer to a certain length of time in which to consider his offer, it would be necessary to pay a certain amount. This is called securing an option. Thus if A had said, "I will sell you this horse for $125.00, and give you a week to consider the matter", and B had paid him even 5c. for thus keeping his offer open, A's power to retract his offer during the week is gone.

Form of Acceptance

31. The acceptance of an offer may be given in a variety of ways. In the case we have been considering, B might reply to A's offer by simply saying, "I will take him", or he might have taken out the $125.00 and without a word handed it to A. In the case of an auction sale, every bid is an offer and the fall of the auctioneer's hammer is the acceptance of a certain one of them. An order sent to a merchant is an offer to buy, and the sending of the goods is the acceptance. If the terms of a contract are put down on a sheet of paper, the signing of the parties is considered their acceptance of those terms.

32. In whatever way the acceptance is given, there must be a distinct act signifying it. "Silence gives consent" is not a saying applicable to this case. A man, in making an offer, sometimes uses these words, "If I do not hear from you by Tuesday, I shall consider my offer accepted". Although no word is received by that time there is no contract, for he has no right to impose such a condition. The mere silence of the other person does not amount to consent or acceptance of the offer.

33. The acceptance, to be binding, must be unconditional, and in terms identical with the offer. Keep in mind that consent means a meeting of the minds of the parties; they must agree to the same terms in the same sense. Suppose in the case we have been quoting, when A had offered his horse to B for $125.00, that B had replied, "I'll give that for him provided you throw in the harness". This would not be an acceptance of A's offer. It is really a new proposition from B to A, and it would rest with A to accept it before a contract would be made. A counter offer operates as a refusal and puts the parties back where they were before there was any offer.

General Offer

34. Sometimes an offer is not made to one person in particular, but to the public at large. A man, for instance, advertises that he will pay $5.00 reward for the return of a horse that has strayed from his premises. This is known as a General offer, while in the other case we would call it a Specific offer. The man who makes a general

offer must live up to his agreement should any person in particular accept its terms. Thus, in the case last quoted, should any one bring back the lost horse he would be entitled to receive the $5.00 reward.

Fraud and Duress

35. It is scarcely necessary to add that assent must be given freely. If it is obtained through threat of bodily harm, illegal imprisonment, or similar unlawful means, it is not binding. Such assent is said to be given under duress. In like manner, we might reason that assent obtained through fraud cannot bind the defrauded person. Fraud may be defined as a false representation of fact, made with a knowledge of its falsehood, and with the intention that it should be acted upon by the complaining party. When either of these illegal means, duress or fraud, is used to obtain assent, it renders the contract voidable at the option of the injured party, that is, the injured party has a right to rescind and to be returned to his former position, or he may elect to ignore the duress or fraud, fulfil his part of the agreement, and compel the other party to live up to his agreement. In contracts, as in other things, sometimes the biter is bitten.

Mistakes

36. The law does not allow much latitude for mistakes but, if the mistake is mutual and one of fact, the contract into which it enters cannot be held binding. A familiar example of mutual mistake is presented where one person having in his possession a counterfeit bill, not knowing it to be worthless, passes it to another person in payment of a debt. Both are mistaken as to the bill, and the transaction in which it played a part is really nullified. There is an old maxim, "Ignorance of the law excuses no one".

Examination Questions

COMMERCIAL LAW

Lesson 2

1. What is business?
2. Define the term contract.
3. What is the difference between a Special Contract and a Parol Contract? Explain the effect of this difference should action be taken to enforce the contract. Discuss the significance of delivery in the case of a written contract.
4. Distinguish between Express Contract and Implied Contract.
5. What is an Executed Contract? An Executory Contract?
6. Define the terms Valid and Void as used in speaking of contracts.
7. Give an illustration of a Voidable Contract.
8. What are the four requisites to the validity of a contract?
9. Who are competent persons?
10. Give a list of persons considered incompetent. Discuss the position of each as to the extent of their incompetence.
11. Give a brief summary of the law concerning Minors.
12. What is mutual consent?
13. What are the elements of consent?
14. Write a note on offer; on acceptance. Discuss the various points relating to offer and acceptance, and explain the significance of a counter offer.
15. Define (*a*) duress, (*b*) fraud, and explain the effect of these on a contract.

COMMERCIAL LAW

Lesson 3

CONSIDERATION

Consideration Defined

1. It would seem to be a general rule in law that no one is bound to do something for nothing. In other words, every contract which shows that two or more persons are to do something must show also that they are to get something for what they do. There must be some reason or inducement for making the agreement or contract. This is known as Consideration, which may be defined as something of value in return for which the contract is made. A agrees to work for B for one week, and B agrees to pay him $20.00 for his service. The money is the consideration to A, while the service rendered is the consideration to B.

2. From this we understand that mere promises to do something or to give something without any return are not binding at law. An honourable man will always consider himself bound by his promises, but the law undertakes to make him carry out just such promises as are parts of contracts. One person might promise to give another a book. If he does give it, it becomes the property of the person to whom it is given and cannot be taken from him; but should the promisor refuse to give up the book he cannot be compelled to do so. Again, suppose A owes B $100.00 due today. Not having the money, he asks B for an extension of 30 days. B gives it. There is nothing to hinder him from suing A tomorrow for the money. His promise was given without any consideration being received for it.

3. In our last lesson we had occasion to note that every contract has two sides to it. This is true in more than one sense. There must be at least two parties to it. The contract is the outcome of an offer or proposition from one party which is accepted by the other. Now we learn that there must be consideration for both parties. Every executory contract, unless under seal, requires consideration to support it. Any promise under seal is valid without consideration. This fact will give us some idea of the importance which attaches to the sealing of a contract. The act of putting a seal after the name is a very simple thing, but its significance is very great.

Sufficient vs. Insufficient Consideration

4. Every inducement which may be held out is not necessarily considered, in the eyes of the law, sufficient to support a contract. In other words, when testing a contract for the presence of this third requisite, we must see that there is consideration and that it is sufficient to support the contract. The following tables will give us an idea of what we need to know about consideration.

Consideration that is Sufficient	1. Good.	
	2. Valuable.	(*a*) Benefit to Promisor.
		(*b*) Loss to Promisee.
		(*c*) Mutual Promises.

Consideration that is Insufficient	(*a*) Impossible.
	(*b*) Moral.
	(*c*) Past or Executed.
	(*d*) Illegal.
	(*e*) A promise to do something to which the other party is already entitled.

Good Consideration

5. Good Consideration consists of the love and affection which one person may have for another. It will support an executed contract if the rights of third parties are not interfered with, but it is not sufficient to support an executory contract. For instance, a father may say to his son, "I am going to give you the car I usually drive". If he gives it he cannot reclaim it on the ground of lack of consideration. The law holds that the love and affection he has for his son is good consideration. If, however, he did not carry out his promise, the son could not hold him to his promise on the ground of good consideration. Again, if the transfer was made with the apparent design of getting the car out of the reach of his father's creditors, the good consideration would not be sufficient to support the son in his endeavours to keep the car away from such creditors. The gift would hold against claims of the father's creditors for debts incurred after the car was given to the son. Good consideration enters but little into our discussion. We sometimes find it used in transfers of property from husband to wife, father to son, etc. Usually speaking, however, the consideration in all contracts must be valuable.

Valuable Consideration

6. Valuable Consideration, as we learn from the table, may be a benefit to the promisor, or a loss or inconvenience to the promisee. If you go into a store and agree with the salesman to pay him $5.00

for a hat, the receipt of that hat is a benefit to you, while its delivery is a loss to the storekeeper. On the other hand the receipt of the $5.00 is a benefit to the storekeeper, while the payment is a loss to you. This gives us a simple illustration of what is meant by valuable consideration as it occurs in most mercantile transactions where there is something of benefit and loss to both parties. It would be just as sufficient if there were no benefit to the promisor but simply a loss to the promisee as, for instance, in a case where I promise to pay $5.00 to a storekeeper for a hat delivered to someone at my request.

7. Valuable consideration may be found in mutual promises, that is, a promise is sufficient consideration for a promise if they are made at the same time. My promise to work for a man for one month is sufficient consideration for his promise to accept my services and pay me $185.00 for them. Mutual promises of marriage are binding upon the parties for the same reason. It is on this ground also that the signatures to a subscription list are sometimes held as binding the signers to pay the amount of their subscriptions. The promise of each subscriber is consideration for the promises of the others.

Adequacy of Consideration

8. So long as there is some consideration it need not be adequate. A man may offer to sell me a clock for $10.00 which anyone would consider worth $100.00. If I pay $10.00 and receive the clock, it is mine, as the law does not attempt to interfere with the valuation a man may put on his property. It is his to do with as he pleases.

Impossible Consideration

9. Having thus obtained an idea of what is meant by supporting consideration, we might next look at the list of non-supporting considerations. In the first place we learn that a promise to do something which it is impossible to do will not support a contract. Thus a promise to go from Toronto to Winnipeg in one hour, or a promise to construct a perpetual-motion machine, would not be binding on the promisor. The thing to be done must be impossible of performance —and not merely very difficult.

Moral Consideration

10. Moral Consideration is not sufficient to support a contract. Thus an adult son was taken sick among strangers who gave him care and furnished him medical attendance. The father, on learning of this, agreed to pay the son's bill for board and attendance. His promise is not binding on him at law. He may be morally bound to pay such bills, but he is not legally bound to do so. If, however, we find that the moral obligation would also be a legal one if it were not

for some rule of law, then such moral obligation would be sufficient to support a promise. For instance, we learned in a preceding lesson that a minor is not bound in certain contracts. Perhaps a nineteen year old man is just as capable of making a contract as a thirty year old man, but the law draws the line at twenty-one and warns all people against making contracts with persons under that age. Thus a minor, while he may feel morally bound to carry out his contracts, is not legally bound and, as we have seen, may on coming of age exercise the privilege the law gives him and cancel contracts (with certain exceptions) to which he may have become a party in his minority. On the other hand, he may promise to abide by his contracts, feeling morally bound to do so. Here we have a case of mere moral consideration which would have been perfectly legal if the rule of minority had not interfered. In such cases the moral consideration is sufficient to support a promise, and promises thus made by a young person on coming of age are binding. Upon this same ground we find courts holding a man to a promise to pay an outlawed debt (except in Quebec), or a debt from which he is released by a discharge in bankruptcy. There is in all such cases a moral right to pay which would be a legal claim but for the rule of law intervening. Such promises to carry out the contracts must be in writing in order to waive the protection of the law.

Past or Executed Consideration

11. By Past or Executed Consideration we understand that which has already been given, and been given without request. As a general rule it is not sufficient to support a promise to pay for it. For instance, suppose goods are sold without a guarantee. Should the buyer return at some future time and ask for a guarantee, the seller could quite freely give him one without being in the least bound. He is making a contract of guarantee and getting nothing for it. The guarantee should have been obtained when the goods were bought, as then the money paid would have stood as consideration for both the sale and the guarantee. The only way to bind the seller in such a case would be to pay him something, however small, for his guarantee.

Illegal Consideration

12. A promise to do something that the law forbids is not sufficient to support a contract. The law cannot enforce contracts which have for their object the breaking of the law.

Gratuitous Consideration

13. A promise to do something that the other party is already entitled to have done can be of no value to him and, of course, cannot

be sufficient consideration. A man may go to some government official for information, promising to pay $2.00 therefor. The law prescribes the fee for this service as one dollar. The promise to pay two dollars could not be enforced because the man is getting nothing more than he is entitled to get for one dollar. If he pays one dollar he is clear, regardless of what he may have promised in addition. Again we will suppose that I have a contractor putting up a house for me at an agreed price. Without any reason he comes to me and says, "If you do not give me $100.00 extra I will stop work". I promise to pay him the extra amount and he completes my house. I cannot be forced to pay the additional $100.00. His only plea could be that he put up my house for me, but I was already entitled to have that done.

14. We have thus learned three facts about a contract. It must be made by competent persons. These persons must agree to the same terms in the same sense, and there must be for each person some consideration for which he gives his promise. Our next discussion will be devoted to a consideration of the fourth essential, Lawful Subject-Matter.

LAWFUL SUBJECT-MATTER

Subject-Matter Defined

15. The Subject-Matter of a contract is the thing that is agreed to be done or to be left undone. Though competent persons may have agreed upon sufficient consideration to do something, their contract may be void because, if carried out, it would violate some law or tend to destroy those interests which the law deems it advisable to protect.

Contracts Disallowed

16. Of course the general rule is that parties may contract to do anything in the nature of things possible. The things that may not form the subject of a valid contract are so few in number, as compared with those that may, that we will find it much simpler to note the subjects disallowed than to begin to list those that are allowed.

17. Contracts that are disallowed—

(1) To commit a crime.
(2) To commit a civil wrong.
(3) Fraudulent. (*a*) On each other.
(*b*) On third parties.
(4) Immoral. (*a*) Wagers or Bets.
(*b*) Sunday Desecration.
(5) Impolitic. (*a*) In general restraint of trade.
(*b*) In general restraint of marriage.
(*c*) Obstructive of public justice.

Contracts to Commit a Crime

18. In the first place we note that contracts, the carrying out of which would lead to the committing of a crime, are void. Two persons, no matter how competent, no matter how well agreed, and no matter how sufficient the consideration, cannot make a contract by which one is, for instance, to smuggle goods into the country.

Contracts to Commit a Civil Wrong

19. It follows very naturally that any contract, the carrying out of which would lead to the breaking of any of our statutes, must also be void.

Fraudulent Contracts

20. The law abhors fraud and will always do its best to unearth it and to defeat its ends. It may therefore be laid down as a general rule that any contract which has for its purpose the defrauding of one of the parties is voidable at the option of the injured person, while any contract by which the two parties conspire to defraud some third person is void. As an illustration of this last-mentioned fraud we may instance the case of the man who is about to fail in business. With a view to defrauding his creditors, he arranges with his friend to take over his goods by what purposes to be a contract of sale. Even when full value is given the friend will find his title to the goods valueless. The creditors may have the sale set aside and their claims satisfied.

Immoral Contracts

21. Our forefathers were very strict in the matter of Sunday observance, and all business and labour were forbidden on that day. Our statutes have imposed practically the same restrictions, allowing only works of charity and necessity. As contracts are the whole essence of business, it follows naturally that Sunday contracts are void. In actual experience it will be found that works of necessity are of great variety, and one is sometimes puzzled to see exactly where the line is drawn. The question is a vexed one and our courts are daily called upon to pronounce judgment upon such cases without any definite conclusion being reached. It should be sufficient for us to know, however, that the law is supposed to frown down Sunday business and Sunday contracts. We should, accordingly, be very chary of being concerned in such contracts.

22. The general theory of our law is that gambling is illegal and that, therefore, contracts of the nature of bets or wagers must be void. As in the case of Sunday desecration, we find here a very vexed question. It is well known that under certain circumstances gambling at such places as race-tracks is openly tolerated, no matter how strenuous

the effort to stamp out the evil. We are, therefore, face to face with a queer condition of affairs. The gambling is tolerated, while the courts refuse to enforce the contracts to which the gambling gives rise. As in the previous case, it should be sufficient for the reputable citizen to understand that in touching anything of the nature of a bet or wager he is not likely to receive much sympathy should a lawsuit be the outcome of the transaction.

Contracts Against Public Policy

23. Some contracts are said to be against public policy. For instance, the law deems it wise to foster trade and any contracts which would tend to unduly restrain trade are held to be void. A retail merchant, in selling his business, may contract not to engage in the same business, in the town where he was located, for a reasonable time (say up to ten years) after selling his business. This is reasonable restraint as it gives the buyer of the business a chance to get some return for what he may have paid for the goodwill of the business. Should the contract provide, however, that the seller was not to engage in business anywhere in the province, then there would be an unreasonable restraint and that clause in the contract would be void.

24. Contracts which place unreasonable restraint on marriage are likewise void. A contract not to marry until one had reached the age of twenty-one would be reasonable. A contract not to marry at all, or a contract not to marry anyone but a particular person, is unreasonable and void. As a further example in this line we might instance marriage brokerage contracts whereby one, for a consideration, agrees to negotiate a marriage between others.

25. The law is always desirous of seeing a friendly settlement of disputes and, accordingly, it discourages any officious interference in disagreements. Contracts by which a lawyer is to undertake to conduct a suit at law, with the prospect of being paid out of what may come to his client through his winning the suit, are generally declared void for this reason. It follows then that a contract to suppress evidence, to commit perjury, or withdraw from the prosecution of a case, is void. For similar reasons it will be seen readily that a contract involving the sale of a public office, or a contract by which an appointment to a public office is to be secured, or a contract by which a legislator is to be paid for his vote is equally void.

STATUTE OF FRAUDS

The Weakness of Oral Evidence

26. Some contracts, from their very nature, must be in writing. For instance if a man gives me a note, the note suggests immediately

the idea of a paper on which his promise to pay is conveyed. Or, again, if we talk of a man having to seal a contract it necessarily means a paper which is to be signed and sealed. Aside from such contracts there are others which, as far as the possibility of making the contract is concerned, could just as readily be made verbally as by reducing them to writing. Thus if I want to hire with a man for a certain time at a certain wage, it might be very advisable to reduce our agreement to writing—still it would be quite possible to make the bargain orally. Of course, in such cases, if any dispute arose and the contract became the subject of an action at law, the only evidence is that which may come from witnesses. This evidence is very likely to be unsatisfactory. Witnesses may perjure themselves, they may forget, they may move away or die, and even honest witnesses may differ as to what was said or done.

Contracts Affected by Statute of Frauds

27. These and other reasons led the English Parliament, in the reign of King Charles II, to pass the Statute of Frauds and Perjuries—the most important statute relating to civil affairs ever enacted. As with a number of other Statutes, it has been incorporated (with necessary changes) in our Statutes. Two sections, the Fourth and Seventeenth, are of peculiar interest to us in the present connection, and we give their requirements herewith. The Fourth Section of the English Statute is as follows: "No action shall be brought whereby to charge any executor or administrator, upon any special promise, to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person; or to charge any person upon any agreement made upon consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought or some note or memorandum thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorised".

In Ontario and Alberta, a promise to pay commission for the sale of real estate must be in writing and signed by the party to be charged or by his duly authorized agent to be enforceable at law.

28. The Seventeenth Section of the English Statute enacts as follows: "A contract for the sale of any goods of the value of ten pounds sterling or upwards (see amount in your province—Sec. 31) shall not be enforceable by action unless the buyer shall accept part of the goods so sold and actually receive the same, or give something

in earnest to bind the contract or in part payment, or unless some note or memorandum in writing of the contract be made, and signed by the party to be charged or his agent in that behalf".

The Real Intent of the Statute

29. Note carefully the wording of the Statute. It says, "No action shall be brought . . . unless the agreement upon which such action shall be brought, or some note or memorandum thereof shall be in writing". That is, in case one person entered action against another concerning any contract of the kinds mentioned, he must have as a ground for his action a written statement of the terms of the contract. The law does not say that if the parties made a contract and did not reduce it to writing they would be doing something unlawful, nor does it say that if they even went so far as to carry it out without first reducing it to writing that they would be doing anything unlawful. The Court simply protects itself, in case an action is brought, by requiring the man who seeks the aid of the law to produce the written evidence of the contract—otherwise he is simply out of court.

Special note should be taken of the fact that where written evidence is required it must be signed by the party to be charged or by his duly authorized agent.

Where Writing is Required

30. Let us look a little more closely at the contracts mentioned in the Statute.

First, "Special promise by an executor or an administrator to answer damages out of his own estate". The man who is appointed executor by a will, or is appointed administrator by a court, is not ordinarily liable to pay anything out of his own pocket. He is liable for a proper distribution of the assets of the deceased person. When they are distributed his liability is at an end. If, for any reason, he should choose to promise to answer damages out of his own estate, such promise must be in writing, signed by him or by his duly authorized agent, to be binding upon him.

Second, "Any special promise to answer for the debt, default or miscarriages of another person". Suppose A goes with B to a grocer. He says to the grocer, "Let B have ten dollars worth of goods and if he does not pay for them I will". This promise, to be binding on A, must be in writing. Care must be used, however, to distinguish between such a promise and a promise to pay for the goods outright. For instance, had A said to the grocer, "Give B ten dollars worth of goods and charge them to my account", we have a different promise altogether and A is liable on his spoken promise just as if he had ordered the goods for himself.

Third, "Any agreement made upon consideration of marriage". This does not refer to a promise to marry, which is always supported in an engagement by the promise of the other party, but rather to a promise to make any settlement of property or payment of money on consideration that the marriage actually takes place.

Fourth, "Any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them". Land being such an important kind of property, the original statute made it necessary that all contracts concerning land, or interest in lands, should be in writing. Our statutes are practically the same in their requirements. The man who buys a farm does not pay down the money and step into the property as the owner steps out. He must get a written deed. In the same way a man who lends money to another on the security of real property receives, in return for the money lent, a Conditional Deed or Mortgage. In leasing property the same formality of a written Lease is required, except in the case of a lease for three years or less which is binding in the oral form.

Fifth, "Any agreement that is not to be performed within the space of a year from the making thereof". As a simple illustration of this kind of contract, we may instance an agreement to employ a person for one year, the work to begin sometime after the day on which the agreement is made. Such a contract must be in writing to be binding. It is well to notice that this clause applies only to such contracts as cannot, from their terms, be performed within a year from the date of making, that is, a contract is not brought within the Statute by reason of the fact that it may not be or is not performed in a year. The agreement must show distinctly that it is not to be performed within a year.

Writing May Be Dispensed With in Certain Cases

31. The Seventeenth Section refers to sales of personal property, and requires the same written evidence of the contract where the price of the goods is ten pounds and upwards. This section is different from the Fourth in that it allows an option, and the writing may be dispensed with "if the buyer shall accept part of the goods sold and actually receive the same", or if the buyer shall "give something in earnest to bind the bargain", or "if the buyer makes a payment on account". Of course, on adapting the Statute to our needs, it was necessary to replace the amount, ten pounds, with a figure in Canadian currency. In Prince Edward Island the amount is thirty dollars or more; in Nova Scotia, New Brunswick and Ontario, forty dollars or more; in Quebec it is "exceeding fifty dollars"; in all provinces west of Ontario and in Newfoundland the amount is fifty dollars or more.

If students are asked to point out the difference between Section 4 and Section 17, the first point to be mentioned is that Section 17 refers to the sale of personal property only. A discussion of the options would follow.

Informal Writing Will Suffice

32. It is well to note that the Statute, in requiring written evidence of the contract, says, "The agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing". This gives the greatest possible scope for anyone who is concerned in the making of the contract to reduce the same to writing. While we are accustomed to see the more important contracts drawn up in a very formal way, and under supervision of one who is skilled in such work, the many small contracts which are being made daily in business may be reduced to writing in the most informal way and still meet the requirements of the Statute. If there be no formal contract, a note or memorandum will suffice. This may be a letter or series of letters, a bill of goods, a receipt for money—in short, any writing which furnishes evidence of an agreement.

Bear in mind always that the written evidence *must be signed by the party to be charged or by his duly authorized agent* before the action is brought.

It should be observed that it is not illegal to enter into contracts as referred to in the Statute of Frauds and carry them out without reducing them to writing—but that if the courts would be called on to enforce them, the written evidence is necessary.

Signatures

33. The signature to the document must be that of the party to be charged therewith, i.e., made by himself or by his duly authorized agent. While it is customary to draw up such papers in duplicate and for each party to sign his name to both, thus giving each party a ground of action against the other, it is not absolutely necessary so long as the person bringing the action can produce a writing signed by the person against whom he is bringing it.

34. From what we have learned it will be seen that a great many contracts require what might be called a fifth requisite. When, therefore, we apply our tests and have satisfied ourselves on the four general points which are necessary to all contracts, it would be advisable as a second step to see whether or not the contract comes within the Statute of Frauds and requires, should an action be brought on it, to be in writing.

THE WRITING OF A CONTRACT

Written Contract Always Preferable

35. We have learned that certain contracts are required to be in writing should they become the subject of an action at law. You will also bear in mind that the Statute of Frauds which laid down this requirement does not prohibit people from putting in writing any contract, whether mentioned in the Statute or not. In fact it is not a bad plan to make a practice of writing out all contracts, as the law accepts even the most informal statement as long as the facts are all set forth.

Model Form

36. If we were to give a general plan on which contracts might be written out, it would appear as follows—

1. The date.
2. The names of the parties.
3. The thing that is to be done.
4. The return that is to be made.
5. The signatures of the parties.

The date is, of course, the first thing placed on any business document. In writing the names of the parties it is customary to give the full name, address, and occupation of the person. Then, in order to avoid repeating these names, the persons are described as the party of the first part, the party of the second part, and so on. In writing out a description of what is to be done, care should be taken to make it complete and explicit. Never try to be too short or concise in this description. You can scarcely put in too much, while you are very likely to put in too little—and thus leave some important detail to be gathered by inference rather than to be learned from the reading of the contract. The same remarks apply to the writing out of the description of what is to be given in return. It is customary to draw up two copies of the contract, each of which is signed by both parties, so that both parties may have equal rights in case it is necessary to call in the aid of the law to enforce the contract. The following will serve as a model for the drawing up of a simple contract—

> Memorandum of agreement made the twenty-fourth day of October, in the year one thousand nine hundred and forty-nine.
>
> Between Adam Brown, of the Township of York, Province of Ontario, farmer, of the first part, and Charles Dunn, of the City of Toronto, Province of Ontario, merchant, of the second part.

The said party of the first part agrees to sell to the said party of the second part five hundred bushels of wheat of the grade known as number one, white, to be delivered to the said party of the second part at his elevator "A" in the City of Toronto, on or before the fifteenth day of November, next, free of all charges, at the price of $1.60 per bushel.

The said party of the second part agrees to purchase the said wheat, and to pay therefor, at the rate aforesaid, upon delivery, as aforesaid. And the said party of the first part hereby guarantees and warrants the said wheat to be good, clean, and merchantable grain.

Witness the hands of the said parties.

ADAM BROWN.

CHARLES DUNN.

Signed in the presence of

E. FAIR, *Witness.*

Signing

37. A person who cannot sign his own name must request some other person to do it for him, after which he may make his mark. The following will illustrate a form used in such cases:

Witness: E. FAIR. his ADAM X BROWN mark

This is sometimes spoken of as signing by mark or making his mark, and the signature so placed is sometimes called a marksman's signature.

38. When a person who cannot read is required to sign an agreement to which he is to become a party, it is necessary that the contract should be read over to him in the presence of a witness. The signature of the party may then be placed in the usual way or by mark. A witness to such a contract should mention the fact in words of the following import, "Signed, after being read over and explained to the said Adam Brown, and he seeming perfectly to understand the same".

Changes

39. If it should become necessary to make any changes in the contract, and these are not of sufficient length to make it desirable to rewrite the contract completely, it will suffice if a line is drawn through the words that are to be changed, after which the correct words may

be written between the lines. The witness should put his initials on the margin opposite every such correction as an evidence that each was made before the document was signed and delivered. Above all things it must be kept in mind that no erasure is to be made with a knife or rubber as such practice does not leave evidence of the nature of the correction and therefore often leads to the assumption that the correction or change was not made with good intent.

Several Sheets

40. If it becomes necessary to use more than one sheet in writing the statement of the contract, these sheets should be paged and fastened together before being signed. It would also be better to have the witness place his initials on each sheet, and then mention the number of sheets that he has so initialed when he signs his name at the end of the document.

Examination Questions

COMMERCIAL LAW

Lesson 3

1. What is consideration?
2. (*a*) Distinguish between good and valuable consideration. Make your answer complete.
   (*b*) A gave his daughter B his radio as a gift. A owed a number of creditors. May the creditors seize the radio? Explain. If A incurred debts after he had given the radio, could these creditors seize the radio?
3. What has the law to say concerning the adequacy of the consideration?
4. Give list of non-supporting considerations.
5. Write a full note on moral consideration. Support your answer by giving examples and show how moral obligations may become legal ones.
6. What is meant by Subject-Matter?
7. Give a list of contracts that are disallowed.
8. What is the effect of fraud in a contract?
9. What is our position with respect to gambling contracts and contracts made on Sunday?
10. Give a practical illustration of a contract in undue restraint of trade, and an example of restraint that may be reasonable.
11. When was the Statute of Frauds and Perjuries passed?
12. Give the provisions of the 4th and 17th Sections. State these fully and as incorporated in the Statutes of your province.
13. Discuss the real requirements of the Statute of Frauds as to the necessity of the contract being in writing.
14. In what way does the 17th Section differ from the 4th Section?
15. You are about to enter into agreement to act as bookkeeper for John Black, merchant, Toronto. Set down in a list a statement of the things you expect to do for him and, in a second list, a statement of the things you expect him to do for you.
16. Using the two lists you have just prepared, draw up a form of contract suitable for the occasion.

COMMERCIAL LAW

Lesson 4

DISCHARGE BY AGREEMENT

Discharge Defined

1. Having learned how a contract is formed, it is next our duty to learn how it is discharged. A contract is discharged when the legal relations which it created have ceased to exist. The ways by which this is brought about, and the parties freed from their obligations, are as follows—

1. By agreement.
2. By performance.
3. By impossibility of performance.
4. By operation of law.
5. By breach.

Discharge by Agreement

2. In the first place we note that what persons are free to do in the way of making a contract they are just as free to undo, provided nothing has been done and both persons are agreed. The general rule regarding the form in which it is necessary to express the agreement to undo is that a contract must be discharged in the same form as that in which it is made. A contract entered into by parol may be discharged by parol, while a contract made under seal may be discharged by an agreement under seal.

Waiver, Modification, Novation

3. The agreement may be made with the idea that the original contract has to be abandoned, in which case it is spoken of as a Waiver or a Rescission. Again, the agreement may have the effect of modifying the terms of the old agreement, or of substituting a new and different agreement for the old one, in which case it may be spoken of as a Modification. Again, we may have an agreement to substitute a new obligation for the old one. For instance, if A owes B, B owes C, and C owes D, it may be mutually agreed that A shall pay D in satisfaction of all claims. This agreement cancels all other agreements and constitutes what is known as a Novation.

Giving Notice

4. Sometimes the contract itself contains special provision for its

own discharge as, for instance, where one person engages to work for another with the understanding that the contract may be terminated by giving a certain length of notice.

Release

5. If the contract is executed on one side, then the obligation cannot be discharged except by performance, by a release, or by an accord and satisfaction. A Release is the act or writing by which some claim or interest is surrendered to another person. Thus the act of a creditor in destroying evidence of a debt, e.g., a promissory note, or in handing it over to the debtor, may be looked upon as releasing the debtor and cancelling the debt. If the release is written it should be under seal, as no consideration will then be necessary. No particular form of wording is necessary, so long as the one party renounces and discharges his claim against the other.

Accord and Satisfaction

6. An Accord is an agreement by which the creditor agrees to accept some other thing instead of that which is due to him. If the debtor owes goods or services, the creditor may agree to accept a sum of money instead. On the other hand, if the debtor owes money, the creditor may agree to accept some article or service instead. As to whether the values are equivalent does not matter as long as there is the agreement to accept something else. When such an agreement is carried out it is known as an Accord and Satisfaction. Assume A owes B $50.00. A gives, and B receives, a desk in full satisfaction of the debt. The desk may not be worth $50.00, but the Court would not interfere with the estimate of value that the creditor has put upon it. If, however, A paid (say) $25.00 cash and B had received it in satisfaction of the full claim at Common Law, the debt is not discharged beyond the $25.00 point, on the ground that B had no consideration for foregoing the rest of the debt. To supply this consideration it would be necessary to show, for instance, that the part paid was paid before the debt was due as a consideration for foregoing the balance; or that the amount was in dispute or uncertain, and the payment was taken as a compromise; or again that the money was paid at a different place than that originally mentioned. The receipt for money thus paid should show that B not only got $25.00 cash but some benefit, as illustrated, in place of the other $25.00. A release under seal would, of course, cover the balance as the seal implies sufficient consideration.

The Common Law as stated above has been altered, so far as the Province of Ontario is concerned, by Section 15 of the Mercantile Law Amendment Act which enacts as follows—

"Part performance of an obligation either before or after a breach thereof when expressly accepted by the creditor in satisfaction or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the obligation".

Composition Agreement

7. A Composition Agreement may be made between a debtor and a number of creditors, whereby all are bound to take less than the full amount of their different claims in complete satisfaction thereof. Such a contract is an agreement between the different creditors as well as between them and the debtor, and the agreement of each to give up part of his claim is sufficient consideration.

As has been pointed out earlier, if a debtor compromised with one creditor, an agreement or release under seal would cover the amount of the reduction.

DISCHARGE BY PERFORMANCE

Discharge by Performance

8. Where there is no agreement to discharge both parties from their bargain, and the contract stands, it is clear that each party is bound to a full and complete performance of his part of the contract. If a particular article is sold, it must be delivered at the time and place and in the manner agreed upon. So it is with any contract. It is generally specified what each party is to do, and the bargain must be carried out to the letter. The above shows the great necessity for being explicit in this matter of drawing up the contract. When it comes to the time of performance, if either party has any doubt as to what he is to do there must be something wrong about the way in which the contract is drawn or made.

Tender

9. Tender is an offer to do some act which a contract binds one to do. It may be an offer to pay money, to deliver goods, to render services, or to perform some other act. If the contract calls for the offering of goods or services, and such offer is duly made but refused, the person offering is released from his debt and may either bring an action against the other party for breach of contract or defend himself against an action for non-performance.

10. If the contract calls for the payment of money and tender is made, the refusal to accept does not discharge the debt but interest could not accrue from the date of tender, while the cost of any action

brought to recover payment would generally be on the creditor. Of course the tender must be kept good, that is, the debtor must always be ready and willing to pay. Should the creditor (after refusing a proper tender) enter a court action, the debtor should pay the money into court.

Legal Tender Money

11. The contract may specify the kind of money to be paid, i.e., Bank of Canada notes, etc. In that case, payment must be offered according to the terms of the contract if there would be a legal tender. If, however, the contract simply calls for the payment of money and does not specify the kind of money, then the law specifies legal tender money to be as follows—

1. For debts not amounting to more than 25c., copper coins.

2. For debts not amounting to more than $5.00, nickel coins.

3. For debts not amounting to more than $10.00, silver coins.

4. Bank of Canada, one, two and five dollar notes, or notes of larger denominations as may be determined by the Governor-in-Council, or gold (if available and in circulation) may be used in any amount.

Proper Tender

12. Ordinarily the money must be produced and actually offered. It is not enough for the debtor to say that he is ready to pay—he must have the money ready also. The tender must be unconditional. The demand for a receipt has been held to make the tender conditional and hence ineffective. There is high authority in support of the debtor's right to a receipt for any amount paid, after he has paid it. The tender must be for the exact amount due. An offer of partial payment is, practically, no offer. The tender must meet the exact terms of the contract as to time, place, and form of payment.

A cheque is not legal tender unless the contract calls for payment by cheque. A cheque is not money.

Counterfeit Money

13. Payment in counterfeit money amounts to nothing. It can neither create nor extinguish a debt. The person who receives such money must return it before he can make good a claim for real payment. It will be understood in this connection that our banks are under obligation to stamp counterfeit money as such immediately upon detecting it.

Money Sent by Mail

14. Money sent by post is at the risk of the debtor unless it is sent that way by the express authority of the creditor, in which case the debt is paid even though the money never reaches the creditor.

Proving Payment—Significance of Receipts

15. The burden of proving payment is usually upon the defendant. He may prove payment by oral or written evidence. The most common written evidence is the receipt, but this paper is not conclusive evidence of payment and may be refuted by oral evidence on behalf of the plaintiff. In other words, the receipt is *prima facie* evidence of payment and shifts the onus of proof to the plaintiff who must then prove that payment has not been received by him. A like presumption arises where a note is found in the hands of the maker, or an acceptance in the hands of the one who accepted it. The necessity of getting a note or draft which one has paid is obvious, and no one should pay the amount of any such paper unless the holder is ready to deliver it to him.

To illustrate the reference to overcoming a receipt, suppose A owed B $100.00 and gave B his cheque for that amount, B in turn giving A a receipt in full. A's cheque is returned N.S.F. It is obvious that B can prove that he received no payment and he may therefore have the receipt set aside. The same idea would apply if A paid B in counterfeit money and obtained a receipt. B could have the receipt set aside by producing evidence to the effect that he had not received payment.

Application of Payments

16. A debtor who owes several debts to the same creditor has the right, in remitting any amount in payment, to say on which debt he wishes it applied. Should the debtor fail to assert his right, the creditor may apply the payment as he sees fit. When neither party has made an application of the payment, the Court (if called upon) will apply it as the justice and equity of the case may dictate. This generally means that a payment is applied to interest first, and then to principal; to an older debt in preference to a later one; to a debt legally enforceable rather than to one not enforceable.

DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

Impossibility of Performance May Not Discharge

17. A contract to do that which is impossible in the nature of things is void. A contract may be to all appearances possible of performance at the time of making it and still, by a change of conditions, become

quite impossible of performance. The general rule in such cases is that impossibilities thus arising after the contract is made do not operate to discharge it and, even though the promisor is not at fault, he is liable in damages for non-performance. Thus a contractor may bargain to put up a house by a certain date. It is burned by lightning just before the date it was to be handed over complete. He is liable in damages for non-performance and cannot recover for what he has done. The contractor, of course, might have protected himself by a clause in the contract to the effect that he would not be held liable to a penalty if delayed through strikes, acts of God, etc. In addition, the contractor may have insured himself against such loss.

Impossibility of Performance May Discharge

18. If, however, the contract is made upon the implied condition that a person retains capacity or that something continues in existence, then the death or incapacity of the person or the destruction of such thing discharges the contract. Thus an artist may contract to paint a picture, but may fall ill before its completion and be unable to produce the picture at the appointed time. The contract will be discharged by his incapacity. Again, a hall may be let for a series of concerts but may be destroyed by fire before the time for performance. The contract will be discharged by the destruction of the hall.

19. Where a person lays a charge or duty on himself it will be seen that impossibility of performance does not, except in the cases mentioned, discharge the contract; but where a person in undertaking a contract has a charge or duty laid upon him by law, an act of God rendering performance impossible operates as a discharge. Thus carrying companies (such as railway lines or express companies) in undertaking to deliver goods are, by Common Law, insurers of goods they carry against loss or damage. If such goods are lost, damaged, or delayed by act of God, the company is excused. Sometimes a change in the law renders performance impossible and so discharges the contract. Thus a tenant of a frame house contracts to rebuild the premises if they are destroyed by fire. The building is burned, but since the original contract was made a by-law has been passed prohibiting the erection of wooden buildings. The tenant is discharged.

DISCHARGE BY OPERATION OF LAW

Discharge by Operation of Law—Merger

20. A Merger is the absorption of one form of obligation into a higher form. It should be observed that it would not be correct to refer to a merger as the absorption of one form of contract into a

higher form, for the merger may be brought about by a process of law instead of by contract as in the case of the court action referred to below.

Where one person is forced to enter action against another for breach of contract and succeeds in getting judgment against the other, the judgment merges the original cause of action and discharges it. Thus if I have to sue a man to recover the amount of a note, and get judgment against him, the note as a cause of action is merged or swallowed up, as it were, in the judgment. It is upon the judgment that I take all future proceedings against the defendant. The parties to a contract may themselves merge one contract into a higher as, for instance, in the case where a note is held for a debt and, for better security, a chattel mortgage is given instead of the note. The mortgage merges the note.

Discharge in Bankruptcy

21. Provision is made under the Dominion Bankruptcy Act for any insolvent person (except a farmer) to make an assignment for the benefit of his creditors. The result of such a proceeding is generally to give the bankrupt an opportunity of compounding with his creditors and seeking a discharge. In the Bankruptcy Court the question of a discharge is in the hands of the Judge, who is bound in certain cases by the Rules and the Statute.

If a bankrupt is successful in obtaining from the Court an order for his discharge, bankruptcy releases him from all debts and liabilities [except to the Crown and in certain other remote circumstances as enumerated in the Bankruptcy Act]. It is sufficient here to draw attention to this mode of discharge without entering into detail and a discussion as to the nature and effects of bankruptcy, or the provisions of the (Dominion) Bankruptcy Act of 1919 and Amendments. Before 1919 there was no insolvency law in Canada such as we have now. Prior to 1919 each province had its own Assignment and Preferences Act which is still in existence, and it was not open to a debtor to apply for his discharge unless all creditors agreed. Before that date, also, a debtor could not be forced into bankruptcy. Since 1919 any creditor or creditors may present a bankruptcy petition if the claim or claims amount to Five Hundred Dollars or more, and he or they can prove that an act of bankruptcy has occurred within six months before the presentation of the petition. The following are Acts of Bankruptcy on the part of the debtor, as set out in Section 3 of the Bankruptcy Act—

(1) If he makes an assignment of his property to a Trustee for the benefit of his creditors generally;

(2) If he makes a fraudulent conveyance, gift, delivery or transfer of the whole or any part of his property;

(3) If he makes any conveyance or transfer of his property or creates any charge thereon, which would be termed a fraudulent preference;

(4) If, with intent to defeat his creditors, he absconds or begins to keep house; i.e. denies his creditors an interview;

(5) If he permits any execution against his property to remain unsatisfied until four days from the time fixed by the Sheriff for the sale thereof, or for fourteen days after seizure, or if the Sheriff's Writ of Execution is returned "no goods";

(6) If he exhibits to any meeting of his creditors a statement showing insolvency, i.e.—where the liabilities are greater than the assets;

(7) If he hands over or disposes of any of his goods with intent to defeat or delay any one of his creditors;

(8) If he makes any bulk sale of the goods without complying with the provisions of the Bulk Sales Act of any Province;

(9) If he gives notice of suspension of payment of debts;

(10) If he ceases to meet his liabilities generally as they become due.

When a person becomes a bankrupt his property passes to his trustee in bankruptcy who can, as far as contracts are concerned, exercise the rights of the bankrupt and do what the bankrupt could not do, namely, repudiate contracts if they appear to be unprofitable.

When the bankrupt obtains an order of discharge he can begin again without being worried by his former creditors. It is well to note, however, that the bankrupt's discharge may also be granted subject to certain conditions. For instance, the Court may require that he shall consent to judgment being entered against him for debts unsatisfied at the date of his discharge, but execution against his property shall not be issued on the judgment without leave of the Court. In no case can he, the bankrupt, be discharged where he has exercised fraud or has committed a fraudulent breach of trust.

Material Alterations

22. Where a contract is materially altered in its written form by one of the parties thereto, *and without the consent of the other*, such contract is discharged at the option of the injured person. A material alteration is one which would cause the contract, if carried out, to

operate differently from what the original contract intended supposing that it were possible to enforce the contract after the material alterations. The following are examples of material alterations: Increasing the principal amount, adding an interest clause, changing a rate of interest, changing the date, or changing the time or place of payment. As an example of an immaterial alteration we may cite the placing of a date in a note by the holder, if the maker had forgotten to place it therein, or the changing of a blank endorsement to a full endorsement by the holder.

DISCHARGE BY BREACH

Breach of Contract Defined

23. If one of the parties to a contract fails to keep to his agreement and breaks through the obligation that the contract imposes on him, we have a breach of contract. A breach by one party will always give the other party the right to seek redress by an action at law. As to whether a breach will also give the injured party the right to consider himself discharged from such performances as may be still due from him is a question of circumstances, and of how he may elect to treat the breach.

Renunciation of Contract

24. If, before the time fixed for the performance of a contract, one party gives notice to the other of his intention not to perform his part, the injured party has two courses open to him. He may treat the contract as discharged and sue at once for damages; or he may ignore the notice, await the time of performance, and then hold the other party liable. This renunciation of the contract, or rendering further performance impossible, may also occur during the performance of the contract—in which case the position of the injured party is the same.

Failure to Perform

25. A breach of contract may take the shape of failure to perform. As to whether or not such a failure operates to discharge the other party is a matter of consideration which must be examined. In the first place we note that failure to perform, to amount to a discharge, must be a failure to perform the vital and essential parts of the contract and not merely some incidental and subordinate part. For instance, a contractor may have completed a house practically according to specifications, with the exception of one small detail. We can scarcely consider in such a case that he has failed to perform his contract. It is certain that the one for whom he is building has a right to demand the completion of the omitted detail, or to demand damages

to that extent—but not to act as though the contract were practically not carried out.

Condition Precedent

26. Again, the contract may state that one party is not required to perform his part until the other party has performed his, or until the happening of some event. This thing that is to be done or is to happen is called a Condition Precedent, and no enforcement of the contract can be compelled until the happening of the Condition Precedent. A man agrees to do a piece of work for another, for which he is to be paid a certain figure when the work is completed. He cannot compel payment before his work is completed.

Dependent Covenants

27. Again, we may have a contract calling for something to be done by each of the parties at the same time, the promise of one party being consideration for the promise of the other. In other words, the agreements are considered to be Dependent Covenants. In such case, neither party can compel performance by the other without first performing or offering to perform his part. A sold B a load of wheat at $1.60 per bushel to be paid for on delivery of the wheat. A cannot compel B to pay without offering the wheat, and B cannot compel A to deliver the wheat without offering to pay.

Independent Covenants

28. Sometimes the parties agree to perform at different times, and performance by one party is not made a condition precedent to performance by the other. Such promises are called Independent Promises or Covenants. A gives B a sixty-day note for which B agrees to give A on his order, some time within ninety days, a certain quantity of goods. A must pay this note at maturity whether or not he has ordered the goods, and B must deliver the goods even if the note has not matured.

Divisible Contracts

29. If the terms of the contract call for complete performance by one party before the other, the contract is said to be Entire. Thus if A employs B to work for him for one year in consideration of receiving one thousand dollars upon the completion of the year, and B quits at the end of six months through no fault of A's, B cannot recover under the contract for what he has done. If, however, the contract calls for several successive acts, each for separate consideration, and the contract does not provide that all acts must be done before payment for any one is due, then we have a Divisible Contract, and each act must be paid for when performed.

Recovery of Value of Work Done

If the refusal of one party to carry out his part of the contract makes performance impossible the other party can claim damages on the contract, and if he himself has done anything under the contract previous to its discharge through impossibility of performance he can recover the value of what he himself has done. On the other hand, if the innocent party has taken some benefit from the contract, the party who is responsible for the breach can make a claim.

Suppose, for example, that A entered into a contract with a municipality to pave certain streets, the contract price being $100,000.00. After A had completed $10,000.00 worth of the work, he ceased operations and refused to continue. The municipality carried out the contract with its own men and used $15,000.00 worth of material that A had purchased and left on the ground. A cannot claim anything for the work he has done but he may claim for the value of his material used by the municipality. If the municipality had suffered a loss through A's failure to complete the work, it may claim damages therefor.

Examination Questions

COMMERCIAL LAW

Lesson 4

1. What is meant by a discharge of contract?
2. What are the five ways in which a contract may be discharged?
3. Explain what is meant by (*a*) waiver, (*b*) novation.
4. What is a release? Give an example of an act of release. If a release is written, state with reason what precaution should be taken.
5. What is an accord and satisfaction? Give two examples to illustrate your answer. Distinguish accord from satisfaction.
6. Discuss the matter of sufficient consideration in the case where a $10.00 debt is to be discharged by the payment of $5.00. In your discussion have regard also to your answer to Question 4.
7. What is tender?
8. If a contract calls for payment in money but does not specify the kind, what is legal tender in Canada?
9. What rules must be observed in tendering money?
10. Is a receipt conclusive evidence of payment? Explain. Give an example to illustrate your answer.
11. State the law with respect to the application of payments.
12. Under what conditions will impossibility of performance operate as a discharge? Explain also when impossibility of performance will not discharge a contract. Give a full discussion and illustrate your answer with examples.
13. Define the term "merger". Give two examples to illustrate the different methods by which a merger may be brought about.
14. What is a composition deed? What is the difference, with respect to consideration, between the position of a man who compromises with a number of creditors as compared with the man who compromises with one? (Note: Keep in mind your answer to Question 4.)

(Continued on next page)

15. Give some illustrations of material alterations. State the effect of material alterations if (i) they are made by mutual agreement and (ii) they are made by one party without the consent of the other.

16. What is a breach of contract?

17. Under what circumstances does a breach operate to discharge the other party?

18. How can a man be forced into bankruptcy, and what has the petitioner to show before his petition is granted?

19. A owed B $10.00 and he owed C $8.00. At B's request A sent to him the $10.00 by mail. Without any request from C he remitted $8.00 to him, also by mail. Both letters, with remittances, were lost. Explain A's position as to these debts.

COMMERCIAL LAW

Lesson 5

REMEDIES FOR BREACH

Suit for Damages

1. When one party to a contract neglects or refuses to carry out his part, the ordinary recourse to the other party is a suit for damages.

The principle upon which the law proceeds is that where a party sustains a loss by reason of a breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.

This rule, however, must be taken subject to considerable limitations.

Nominal Damages

2. If the plaintiff can prove a contract in his favour and also its breach, but fails to prove any actual damage, he is generally awarded nominal damages—a few cents, very often—as an indication of the proof of his contention that his rights were infringed.

Liquidated Damages

3. In some contracts it is distinctly stated what damages are to be recovered in case of breach. In such instances, of course, the damages are generally awarded as pre-arranged and are known as Liquidated Damages. It may be, in cases of this kind, that the contract specifies damages to an extent that would more than compensate the injured party so that the damages would really amount, in part, to a penalty.

Where this is the case, the damages allowed by the Court may be just such an amount as will prove compensation for the actual injury sustained. The principle in such a case would seem to be that the Court will look after the matter of penalty and recover the same where it is necessary, and that the individual should not interfere with such a matter. In the case of a dishonoured Bill of Exchange or Promissory Note, the liquidated damages are set out in the Bills of Exchange Act, as follows—

> "Where a bill is dishonoured, the measure of damages which shall be deemed to be liquidated damages shall be—

"(*a*) the amount of the bill;

"(*b*) interest thereon from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case;

"(*c*) the expenses of noting and protest."

Compensatory Damages

4. If the contract itself does not specify the damages to be awarded, nothing can be recovered save the actual loss sustained. The damages so awarded are known as Compensatory Damages.

Exemplary Damages

5. The Court may sometimes award Exemplary Damages or "smart" money, in addition to compensatory damages, where it would appear that a wrong has been committed under circumstances of malice or oppression. It may be said that Exemplary Damages are given not only to compensate the injured person but also to mark the indignation of the Court at the conduct of the defendant.

Defendant to Carry Out Contract

6. Sometimes the defendant is compelled to carry out his contract. This, however, is only exceptionally the case. Thus where one has contracted to deliver ordinary merchandise which can be procured in the market, and which has no peculiar value to the other party, a breach of such contract would ordinarily entitle the plaintiff to recover only such damages as he would sustain in paying more for the goods than the contract price.

In the case of a contract to convey lands, however—where the advantage of location, adaptability for particular purpose, and so on, make money damages quite inadequate—the Performance of the contract may be ordered.

OUR SYSTEM OF COURTS

Ontario System

7. While it is not exactly within the scope of a work of this description, we believe that it will not be out of place to give some idea of the system of courts through which the law is administered.

While there may be some slight difference in the systems of the different provinces, we believe that the description we herewith append of the Ontario system will serve to illustrate the general plan upon which the different Law Courts are arranged.

Police Court

8. At the bottom of the Judicial System are the "People's Courts", viz., the Police Court and the Division Court.

The first of these has to do with the punishment of crime, and the second with the settlement of small debts and disputes over contracts.

The Police Court is the court in which most criminal prosecutions are commenced. From it cases may be carried to the Sessions of the Peace for the County, to the Superior Courts, and even to the Court of Appeal for Ontario. In criminal cases there is a right of appeal to the Supreme Court of Canada when there is disagreement amongst the judges in the Court of Appeal of a province; but if the judges in the Provincial Court of Appeal are unanimous there is no further right of appeal. There is no right of appeal to the Privy Council in criminal cases.

Division Courts

The Division Courts are so called because, for purposes of these courts, the different counties are divided into sections or divisions—each division being supplied with a court. Division Courts have jurisdiction in the following cases—

(1) All personal actions where the amount claimed does not exceed $120.00.

(2) In personal actions, if the parties consent thereto in writing and the amount claimed does not exceed $200.00.

(3) All claims and demands of debt, account, or breach of contract, or money demand—whether payable in money or otherwise—where the amount or balance claimed does not exceed $200.00.

(4) Claims for the recovery of a debt or money demand where the amount (exclusive of interest) or the balance does not exceed $400.00, the amount being ascertained by the signature of the Defendant. The costs in this Court are kept down to a very small amount so as to put a legal remedy within the reach of citizens of the narrowest means. In amounts of less than $100.00 for instance, no lawyers' fees can be taxed against the unsuccessful party.

County Court

9. The next higher court in which actions can be taken is the County Court.

In criminal matters this includes the General Sessions of the Peace where, however, no one can be tried for an offence punishable with death.

Civil actions can be entered in amounts up to $500.00, action on contracts involving amounts up to $800.00, and in partnership affairs where the capital of the partnership does not exceed $2,000.00.

One of the judges in the County Court sits in the Division Court previously mentioned. A judge of the County Court also presides over the Surrogate Court, which deals with the estates of deceased persons.

Supreme Court of Ontario

10. The Supreme Court of Ontario includes two branches—"The Court of Appeal for Ontario" and "The High Court of Justice for Ontario".

The High Court of Justice for Ontario is the court of first hearing for all civil actions for amounts ranging above the figure which can be sued for in the County Court. It is in this court also that criminal prosecutions involving the life of the accused are heard.

All criminal cases in the High Court of Justice for Ontario require a jury, while a civil suit may be tried with or without a jury.

The Court of Appeal for Ontario consists of the Chief Justice of Ontario, a chief justice in appeal, and six other judges. Every appeal to the Court of Appeal must be heard by not less than three justices of the court sitting together and always before an uneven number of justices. In civil actions where the amount involved is $100.00 or over, there is a right to appeal from the Division Court to the Court of Appeal for Ontario. There is also the right to appeal from any order or judgment made by a judge of a County Court or of the High Court of Justice. In criminal cases there is also the right of appeal to the Court of Appeal.

Supreme Court of Canada

11. The highest court of Canada's judicial system is the Supreme Court of Canada, and in all civil actions where the amount involved is $2,000.00 or more there is the right of appeal from the Court of Appeal to the Supreme Court of Canada. If it is decided to carry the case any further than the Supreme Court of Canada, appeal must be made to the Judicial Committee of the Privy Council in England—the latter being the final Court of Appeal in the British Empire. Security is asked as a rule when the Appellant appeals to the Privy Council, but applications can be made In Forma Pauperis. This gives a poor man a chance to appeal if he has not the funds to raise for the purpose of putting up a bond—that is, provided he has a good prima facie case.

Collecting a Debt

12. To understand better the procedure in collecting an amount through process of law, we shall suppose that the person is entering action in the Division Court. The plaintiff, or one who commences the action, must leave with the Clerk a simple statement in writing of the cause of the action. If it is an account that he desires to collect, the statement may take the form of the usual statement of account.

Summons

13. Any person who is served with a Division Court summons will find therein stated the number of days that he has at his disposal in which to enter a defence. This defence must be filed with the Clerk of the Court, and is simply a statement of why the defendant does not think that he should pay the amount claimed by the plaintiff. If any information is desired as to the form of putting in this defence, it may be obtained from the Clerk of the Court.

Judgment

14. When the case comes into Court, it is the duty of the judge to decide between the plaintiff and the defendant as to who is in the right. If he finds that the plaintiff is right in his claim, and is entitled to damages, he delivers a decree to that effect known as a Judgment. This judgment is practically an order to the defendant to pay over a certain amount of money in order to clear himself.

Execution

15. If the judgment is not paid within fourteen days (or the time specified therein) an Execution may be obtained to seize and sell the debtor's property to recover the amount of the judgment and costs.

Judgment Summons

16. In case no property is found with which to satisfy the judgment claim, the creditor may, under a judgment summons, have the debtor brought before the Court to be examined on oath as to the disposal he may have made of his property. After such hearing the judge may order a weekly or monthly payment and, if this sum is not paid, the debtor, on a creditor's application, may be imprisoned for contempt of court.

Bear in mind that the debtor is not imprisoned for failure to pay the debt but because, in failing to live up to the order made by the Judge, he is guilty of contempt of court.

This will explain how it is that, while in Canada a man cannot be imprisoned for debt, a debtor may nevertheless, through legal proceedings, find himself imprisoned.

17. If the debtor should be imprisoned and his failure to pay is simply the outcome of inability to pay, a lawyer should be called in to draw up a statement of this fact to be placed before the judge, and thus have the judge's first order set aside and the debtor released.

DISCHARGE OF RIGHT OF ACTION

Statute of Limitations

18. It is a maxim of law that the laws should assist those who are alert and watchful rather than those who fail to take advantage of the opportunities afforded them.

Based upon this maxim we find upon our statute books a law known as the Statute of Limitations, the effect of which is to require that actions for the recovery of debts must be commenced within a certain time or not at all.

The statute says, in effect, to all those who would seek the aid of the law in recovering debts: "As soon as you have a right to proceed against a man for an unpaid debt, the Court is open to you. It will be open to you for a reasonable time only. Prosecute your claim in that time for, if the time allowed passes without action being entered on your behalf, the Courts are, after that, closed against you".

Outlawed Claim

19. After the statute has thus cut off the remedy of a suit at law to recover the debt or claim, it is said to be barred or, in popular language, outlawed (prescribed).

Remember, the statute simply bars the claimant from using the Court as a means of recovering his money. A moral right to the money still remains, and the debtor is morally bound to pay. If the debtor can be persuaded to pay, well and good; if he refuses to pay, he cannot be forced to do so. It may be well to note here that in Quebec the debt as well as the right of action is barred, i.e., extinguished.

Actions on Notes and Accounts

20. The period of time within which the action must be commenced varies with the kind of claim. As a general rule we might state that actions on ordinary debts or simple contracts must be commenced in six years, while those on sealed contracts must be commenced in from ten to twenty years.

21. To be specific, we may take a note as an example: if given June 1st at one month, it falls due July 4th; if not paid on July 4th, after due demand for payment, the holder has a right, commencing July 5th, to enter suit for the recovery of his money.

This right will last for six years, in all provinces except Quebec, counting July 5th as the first day of the time. In Quebec the time is five years.

If a bill of goods is sold May 5th, on thirty days' credit, it should be paid June 4th. If not, after due demand for payment, a right of action accrues to the creditor on June 5th, and again, that day marks the first of a period of six years, during which action may be commenced. In Quebec it is five years.

It is important to observe (see also Sect. 27) that while in the first place the statute runs from the due date, a payment on account of principal or interest made after the due date will give a new date from which the statute will commence again to run. The same is true if a written acknowledgment is given that includes at least an implied promise to pay. These factors should never be overlooked in the discussion relating to the running of the Statute of Limitations. In the case of a debt evidenced by a contract under seal, a written acknowledgment signed by the party to be charged will give a new date from which the Statute will run even though there is no implied promise to pay.

22. It may be well at this point to note the fact that accounts are, with respect to outlawing, itemized, that is, if a number of purchases are made on different dates, each one is treated as a separate account. The mere fact that the seller may, for convenience, make a statement at the end of a certain period, showing all of the different purchases for that period, does not make one account of the several items mentioned. The items of such a statement may, however, be merged into a single debt by the process of getting what is called an Account Rendered.

To form an Account Rendered it is necessary that an agreement should be made between the debtor and the creditor, whereby the whole account is acknowledged. This acknowledgment of the account may be obtained by rendering a statement of account, on which the debtor places a writing setting forth the fact that, on a certain date, the debtor acknowledges the statement to be a correct estimate of his indebtedness down to a certain date. This same result may be obtained by the creditor applying a payment received, and not accompanied by explicit directions as to its application, in the following manner (see Sec. 16, Lesson 4): Divide the payment into sections and apply a

certain amount on each purchase up to date. The entry made in the books would have to show that this was done, but the receipt that is given to the customer may be the usual receipt for money paid on account. If some action of this kind is not taken to bring the several purchases into a single amount, it must be understood that each stands by itself and the date of outlawry for each must be separately reckoned.

Actions on Chattel Mortgages

23. A chattel mortgage gives the holder two claims, from either of which the amount due may be recovered. There is first the personal covenant to pay the mortgage money. As this is part of a covenant under seal it is good in any province (except Quebec) for twenty years from the due date, or from the date of the last payment on interest or principal, or from the date of the last written acknowledgment. Chattel mortgages are not used in Quebec.

In the second place, there is the claim against the property. In Ontario this is good for one year from the date of the registration of the mortgage as against creditors and subsequent purchasers and mortgagees in good faith—unless it is renewed, or the goods taken possession of, or a new mortgage executed.

In Manitoba, Alberta, Saskatchewan, Yukon, and Northwest Territories the claim against the property is good for two years; in British Columbia for five years; in Nova Scotia for three years; and in New Brunswick for one year.

Actions on Real Estate Mortgages

24. Mortgages on real estate outlaw in Ontario and Manitoba in ten years. This is true with respect to the personal covenant and also to the claim which the mortgage gives against the property. A payment on account or a written acknowledgment has the same effect as in the case of the personal covenant in a chattel mortgage.

In Quebec mortgages on real estate outlaw in thirty years; in Alberta, Saskatchewan, Yukon, and the Northwest Territories in twelve years. In all other provinces they outlaw in twenty years.

Devises and rights to recover dower are barred in the same length of time that mortgages on real estate are barred. An action to recover a legacy, whether it is or is not charged upon land, must be commenced within six years after it became due.

The provisions that have been outlined relative to dates under a simple contract will apply to the interest as well as to the principal.

In the case of interest on mortgages, the amount of interest recoverable under the personal covenant will be for ten years, although

only six years' interest may be recovered out of the land. The interest for the other four years would have to be recovered from the mortgagor personally.

The recovery of arrears of rent, whether or not it is claimed out of the land, will be subject to the same provisions as those outlined for an open account or promissory note, etc.

Actions on Judgments

25. Judgments in British Columbia, Ontario, Nova Scotia, New Brunswick, Prince Edward Island, and Newfoundland outlaw in twenty years from date when entered, or last execution on them, or the last written acknowledgment, or a payment on account.

In Manitoba, Saskatchewan, and Alberta judgments outlaw in ten years; in the Yukon and Northwest Territories in twelve years; and in Quebec in thirty years.

Running of Statute Postponed

26. The running of the statute is postponed by any disability which would prevent the plaintiff from entering an action, or the defendant from opposing an action. Actions by or against minors, persons insane, or persons out of the province at the time the right of action accrued, may be commenced within the like period, after the removal of the disability, as is allowed for bringing action in ordinary cases.

It will be noted that, besides disability, absence of the defendant from the province would have a like effect in postponing the running of the statute. In these cases it will be noted that the disability or absence must be in existence at the time the right of action accrued. For instance, in the case of absence of the defendant, if the plaintiff had a right to enter action for the recovery of a debt and failed to do so, the defendant's moving out of the province some time after the right accrued would not prevent the statute running during his absence. The time for the commencement of the six-year period (five years in Quebec) is only postponed by his being away from the province at the time the plaintiff acquired the right to proceed against him.

Effect of Part Payment

27. Any part payment of the principal or interest or a written acknowledgment that includes at least an implied promise to pay has the effect of fixing a new date from which to count the running of the time, i.e., the Statute of Limitations will start running again from the date of such payment or written acknowledgment. The conditions just stated apply in all the provinces since they deal with a debt that is not outlawed.

In the case of a debt that has become outlawed, a written promise to pay it or a part payment made thereon has the effect of reviving the debt except in the Province of Quebec. In the Province of Quebec when a right of action is barred the debt is extinguished. Therefore, in Quebec, a claim that is barred could not be revived by a part payment or by a written acknowledgment with a promise to pay.

Except in Quebec, a payment made specifically on account of an outlawed debt revives the debt. If the debtor owed other amounts to the same creditor and makes a payment on account without specifying how it is to be applied and the creditor applied it to the outlawed debt, the payment would not revive that debt although the creditor, except in Quebec, is within his rights in applying the payment to it. It would need to be specified by the debtor that the payment was on account of the outlawed debt in order to give a right of action to recover the balance.

Where Statute Does Not Apply

28. The statute does not apply to bank bills, bank notes, or other evidences of debt issued by a bank. These never outlaw by lapse of time.

This is true also of Express Trusts. For instance, a farm may be deeded in trust to a person for the benefit of heirs or other persons. This farm would never become the property of the trustee, no matter how long he might occupy it.

ARBITRATION AND AWARD

The Submission

29. Instead of having a dispute settled by an action at law, the parties sometimes leave the matter to a few persons, mutually agreed upon. These persons are not necessarily judges or lawyers, but very often men who are of good business ability and who have knowledge and experience concerning the points in dispute.

This is called submitting the matter to Arbitration, and the persons who are thus chosen to settle the dispute are called Arbitrators. The agreement to refer the matter in dispute to arbitrators is called a Submission. In matters of little moment this may be verbal, but it is better in all cases to have the Submission in writing and under seal.

Consenting parties to such an agreement, if properly drawn, are in the same position as parties to any valid contract. If one of them violates his agreement by refusing to arbitrate, or by resorting to the Courts, he may be held liable in an ordinary action for damages for breach of his agreement to arbitrate.

The Arbitrators

30. The reference may be to a single arbitrator or to two arbitrators. If two arbitrators are chosen, they in turn may appoint an umpire. If the arbitrators fail to agree, a notice to the umpire will cause him to enter upon the reference in the place of the arbitrators.

The Award

31. The finding of a board of arbitration is known as an Award. This award should be in writing, signed by each arbitrator in the presence of the other. To be binding, an award should embrace every matter submitted, and it should be certain and final. Thus if the award says that one party shall enter into a bond with the other but no mention is made of the amount of the bond, the award is void for uncertainty. Again, if the award gives to one of the parties any further authority or discretion in the matter, it is void for want of finality.

The Courts have power also to set aside an award for corruption or misconduct on the part of the arbitrators, or where it is made to appear that the arbitrators have fallen into an obvious mistake of the law. Otherwise, the award made by the arbitrators or umpire shall be final and binding on all parties claiming under the Submission.

Note.—Students need not submit written answers to Questions 3 to 10 inclusive, unless they so desire. It would, however, be in order for them to familiarize themselves, to some extent at least, with the jurisdiction of the various Courts within their own province leading up to the Privy Council, as a matter having some practical value.

Examination Questions

COMMERCIAL LAW

Lesson 5

(*See note on previous page.*)

1. What remedy has the injured party where the other party fails to carry out his part of a contract?
2. Name and describe the different kinds of damages that may be awarded.
3. Distinguish between the Division Court and the Police Court.
4. What is the jurisdiction of the Division Court?
5. What is the jurisdiction of the County Court, and of the Surrogate Court?
6. Name the divisions of the Supreme Court.
7. What is the jurisdiction of the High Court of Justice for Ontario?
8. What cases come before the Court of Appeal for Ontario?
9. What is the court of last resort in the Province of Ontario (or of your Province)?
10. To what courts can an appeal be made, after it has run the course of the Provincial Courts?
11. Describe the procedure by which a case is brought into the Division Court.
12. Follow such a case in its various stages, until it may be proven that the defendant is unable to pay damages.
13. What is the Statute of Limitations?
14. Describe the action of the Statute of Limitations with reference to an unpaid note or book account. Include in your answer different factors that will fix the date from which the statute will run.
15. With respect to outlawing, what is meant by saying that an account is itemized? Define "Account Rendered", and state its effects.

(*Continued on next page*)

16. Describe the effect of the Statute of Limitations on chattel and real estate mortgages. Have regard to the different factors as in Question 14.

17. How may the running of the Statute be postponed?

18. To what evidences of debt does the Statute not apply?

19. What is meant by submitting a case to Arbitration?

20. What is a Submission, and what is an Award?

21. What are the requisites of an Award?

22. A owes B $300.00 for goods. On February 1, 1946, A gives his note at three months to B for the amount, but has made no payments. On October 7, 1952, A writes to B as follows: "I admit that I owe you the amount of $300.00, but I do not intend to pay you". Can B collect? Discuss this, having regard to the law in your province.

23. A contracted to erect a building for B at a cost of $50,000.00, A to supply his own material. When the contract was partially completed A ceased operations and B had to complete the work himself. B used $7,000.00 worth of A's material. The value of the work completed by A was $5,000.00. What is A's legal position relative to the work he completed and to his material that was used by B?

24. A owed B $500.00 on a promissory note which was seven years overdue and $200.00 on an account that was two years overdue.

    A paid B $150.00 on account without specifying how it was to be applied and B applied the payment to the outlawed debt. B later enters action against A to recover the balance due under the note and the $200.00 due on open account.

    State, with reasons, whether or not B can succeed in his action.

COMMERCIAL LAW

Lesson 6

PROPERTY

Property Defined

1. Giving the term Property its strict definition, it is the right which a person has to possess, use, enjoy, and dispose of anything to the exclusion of all other persons. In every-day language, however, the term "Property" is used to designate the thing in which the right of property exists. Thus one may say, "This book is my property". It is well to distinguish between the legal and the popular uses of the term, as it will help us to understand how the right of property may exist where there is nothing tangible, like the book, in evidence.

Personal Property

2. Personal Property is the right or interest which one has in things personal. Things personal are things moveable, that is, those things which may accompany the owner's person wherever he may go. They are of two kinds—Corporeal and Incorporeal. Corporeal Personal Property is that which has an actual and material existence as, for instance, a horse, a book, or a table. The legal term for such property is Choses in Possession, or Chattels. Incorporeal Personal Property includes all rights which, by being realized and enforced, give us the control of material things. To this class belong, in the first place, Choses in Action. These include book debts, and debts due on written securities—such as notes, cheques and bills of exchange. In the second place we have Rights of Action, or rights of recovering damages for wrongs of all sorts—such as the right of recovery for personal injuries.

Real Property

3. Real Property is the right or interest one may have in things real (immoveable), which include land and whatever is permanently affixed to land, either by nature or by the hand of man. It also includes certain rights connected with the land. Like personal property, it may be corporeal or incorporeal. In the legal sense, corporeal real property (or land) includes not only the earth, but also all buildings, fences, and structures upon the earth and, in addition, all minerals, oils, and gases beneath the surface. Water is also a species of real property. Where running, the owner of the land through which it

flows has the right to enjoy its free flow from the land of the owner above him, but must return it pure, and without material diminution, to the owner below him.

4. Incorporeal real property (or easements) includes the rights one may have in or over the estate of another. The most important are rights of way and party walls. A way is the right of one person who is not the owner to pass over the lands of another. This right may be given by deed, or by such long use that the granting is presumed. The party wall is a wall common to two adjoining buildings, on which each of the buildings depends for support.

Change of Classification

5. Having noted that property may be classed as real or personal, it is well also to note that property of one class may, by change of circumstances, become property of the other class. Trees, while growing upon the land, are considered to be real property, but when they are cut down they are personal property. Building material, such as lumber or stone, is personal property when it is lying loose upon the ground, but when it is erected into a building it becomes real property.

Fixtures

6. Personal property when affixed to real property is sometimes spoken of as a fixture and, ordinarily speaking, must remain part of the realty. For various reasons it is necessary to modify this general rule and a tenant may, on leaving the premises, take with him whatever he may have fixed to the realty for the purpose of trade, agriculture, or domestic use, always provided that such fixtures are attached in such a way that they may be separated without damage to the real property. In this way counters, shelving, gas or electric fixtures, stoves, ranges, and even temporary buildings, may be removed and again become personal property.

SALES OF PERSONAL PROPERTY— GENERAL PRINCIPLES

Sale Defined

7. By this time we should have a very good knowledge of how a contract is made, and what its essentials are. We should also have knowledge of what property is, and what the two classes of property are. We should now be in a position to enter upon the study of a very common form of contract in every-day business—a contract for the sale of personal property. Business is so much a matter of buying and selling that this form of contract should receive our early and earnest attention.

8. A sale of personal property is a transfer of the general and absolute property in a thing personal for a price in money. In a sale, both title and the right to possession pass. Let us remember here the exact definition of the term Property—for we may find that a thing itself passes from one to another and still there is no sale, because the title is not passed. For instance, by the process of bailment, goods may be loaned, pledged, or hired out to others, and while these others thus get possession they do not get ownership or title. Again, goods may be mortgaged, in which case the title passes but not possession. In a mortgage, however, there is the condition that if the mortgage money is paid the title reverts to the original owner. Goods may also be given to another, or goods of one kind may be exchanged or bartered for goods of another kind. In either of these latter cases both title and possession pass. The salient features of a sale are the transfer of the title and the price paid in money.

Requisites of Contract of Sale

9. As we had occasion to note in Lesson 2, the discussion of the essentials of any contract will always proceed from a knowledge of the requisites in general of any contract. Thus we learn that a contract for the sale of personal property must at the outset show competent persons, mutual assent, sufficient consideration, and a lawful object. We must look at each one of these in turn, and see what peculiar features are demanded in each case by this particular contract.

Parties to Sale

10. The parties to a sale are the vendor or seller, and the vendee or buyer. The ordinary requirements as to competency obtain here (see Lesson 2), but in addition to these we note that the seller must be the true owner. A thief or finder can give no better title, to one buying from him, than he had for himself. The owner of lost or stolen property may claim it, no matter in whose hands it may be found. The principal exception to this rule exists in the case of stolen or found money transferred, or negotiable paper payable to bearer or endorsed in blank.

Consideration for Sale

11. The consideration must be a price payable in money or money's worth. The agreement may expressly fix this sum, but if it does not the reasonable price of the goods is implied. The parties may also agree that certain third persons are to fix upon the price, the sale being incomplete until these persons have decided upon the price.

Sale vs. Agreement to Sell

12. We also note that there must be a lawful object. The contract

must be for the sale of things lawful to be handled and actually in existence. If the property has ceased to exist, or has passed out of the hands of the seller, there can be no contract of sale. Thus a grain merchant has a cargo of wheat coming to him and before it arrives he sells it, without knowledge of the fact that the vessel carrying the grain had foundered and that her cargo had been destroyed. There is no sale. On the other hand, things that are to come into existence—such as the milk a cow may yield—may be made the subject of an "agreement to sell". From this we learn that the word "sale" implies an executed contract and contemplates a present transfer of property. The expression "agreement to sell" implies an executory contract and contemplates a future transfer of property.

When Writing is Required

13. We have already noted the effect of the Seventeenth Section of the Statute of Frauds upon contracts of sale, and recommend a careful reading of Lesson 3 to refresh the memory. With this general groundwork laid, we should be in a position to undertake the further study of this form of contract.

SALES OF PERSONAL PROPERTY— WHEN THE TITLE PASSES

Executed vs. Executory Contract

14. While the term "sale" is often indiscriminately used to refer to a present sale and also to a contract to sell in the future, there is a wide difference in the effect of the executed contract as contrasted with the executory contract. In the first case the title passes from the seller to the buyer, while in the second case the title remains with the seller until some further act converts the executory contract into a complete and perfect sale. This distinction is important in deciding who must bear the amount of the loss or damage that may come to the goods for, as we have seen, the mere possession of the tangible articles themselves does not always carry with it the assurance that the possessor is the one in whom the title vests. It is important, therefore, to know when the title really passes.

Parties Make the Terms

15. In arriving at a decision as to when the transfer of the title takes place, we must remember that in a contract of sale (as in other contracts) the parties are free to make the terms to suit themselves. If they had not expressed themselves, then we must consider what is implied or to be presumed. If in any case the question arises, "Has the title passed?" we must find what agreement the parties have made,

and if the contract is silent on the point we must find what would be presumed under the conditions.

Specific Chattels

16. Specific Chattels are those that are in existence, picked out and appropriated to the contract. Something may yet have to be done to them, but we know the exact things with which the contract is concerned. We have an example of Specific Chattels in the case where a particular coat or a certain car is sold. If sold unconditionally, and nothing remains to be done to put the article in shape for delivery, the presumption is that a present sale is intended, and the title passes at once. If anything remains to be done to put the article in condition for delivery, such as weighing, measuring, or separating from a mass or lot, it is presumed that the title is not intended to pass. Bear in mind that a distinct declaration by the parties as to when the title should pass will govern, and so relieve us from the necessity of deciding the point by presumption or implication in either case.

Chattels Not Specific

17. In the case of a contract for the sale of Chattels Not Specific, the presumption is that no title is intended to pass until a certain act has been performed. Thus where goods are to be manufactured, no title is presumed to pass until they are finished. If the goods sold are part of a mass, no title is presumed to pass until the quantity bought has been set aside and identified as the property of the buyer as, for instance, where a number of barrels of oil are to be taken from a tank containing a large quantity. Grain elevator cases present an apparent exception to this rule, and the man who has stored grain in an elevator may make a present sale of his quantity, or any part of it, by simply giving a delivery order to the buyer. The title passes with the order, even if the grain is not separated from the mass.

Bill of Lading

18. If goods are ordered from a distance, it is presumed that no title is to pass until the particular goods are appropriated to the contract. This takes place when the goods are handed over to the transportation company named by the buyer, or to the usual one if the buyer did not specify. Again we must notice that, while this is the presumption in case the parties have not made a special agreement touching the point, such an agreement, if made, must govern. It is also to be noted that the seller, by his action, may hold the title until such time as he is satisfied that the goods are to be paid for. For example, a wholesale merchant receives an order from a retailer. He fills the order and places the goods in the hands of a railway company. This necessitates the making out of a Bill of Lading. The Bill consists

of three parts, made at one writing with carbon—the Original, the Shipping Order, and the Memorandum. In ordinary cases, where the shipper is sure of his customer's financial standing, he uses what is called the Straight Bill of Lading. In such a case the Bill of Lading is made out in favour of the buyer. The Original is sent to him, the Shipping Order is retained by the railway company, and the Memorandum is held by the shipper. The buyer has thus in his hands a paper by which he proves his title to the goods when they arrive. If the shipper wishes to make payment absolutely secure he uses a Negotiable Bill of Lading. In such a case the Original is given to the shipper's bank, along with a draft on the buyer. If the buyer honours the draft, the bank endorses the Bill of Lading to him. If he fails to honour the draft he cannot get the Bill of Lading. In this way it will be seen that the title does not pass at the time the goods are put into the hands of the transportation company, but rather when the draft is honoured. The buyer will be requested to honour the draft by payment unless instructions by the vendor permit release of documents on acceptance of the draft. Acceptance of a draft provides only a promise to pay. It is not in itself a payment.

C.O.D. Shipments

19. As to the matter of shipments sent C.O.D. (Cash on Delivery), it depends on the circumstances of each case as to whether the title passes at the time the goods are placed with the carrying company, or when the cash is paid to the carrying company and the goods delivered to the buyer. One thing is certain—the buyer cannot get possession of his goods until he has paid the price.

Stoppage in Transit

20. We notice next that even where the Straight Bill of Lading is used and made out direct to the buyer, and the goods placed with the transportation company for delivery, the seller may, under certain circumstances, regain his goods and the title thereto. This is done by exercising the right of "Stoppage in Transitu". This is the right of the unpaid seller of goods to regain possession of them, while they are being transported to the buyer, on discovering that the buyer had become insolvent. The following conditions must exist before the right can be exercised—

1. The goods must be unpaid for;
2. They must be in transit;
3. They must be in possession of a third party;
4. The buyer must be insolvent.

The stoppage is effected by simply notifying the carrying company by letter, telegram, or any other means that the goods are to be held

and not delivered. If a Negotiable Bill of Lading had been sent to the buyer who, in good faith and for value, had sold the goods before their arrival, and the Negotiable Bill of Lading had been indorsed by him to the purchaser, then the right of stoppage would be lost.

SALES OF PERSONAL PROPERTY—DELIVERY

Actual vs. Constructive Delivery

21. We have learned that the title to goods may pass and still the buyer may not have actual possession of the goods sold. This may arise from a variety of circumstances. For instance, the buyer himself may, after completing the purchase, go away and leave the goods in possession of the seller. This may be because they are so bulky that immediate removal is impossible, in which case he is supposed to remove them within a reasonable time. It may be, on the other hand, that he simply leaves them with the seller because it is a convenience to him. Any risk in either of these cases will be upon the purchaser. In case the goods are impossible of immediate removal, a constructive delivery may sometimes be effected. For instance, the key of a warehouse may be given to the purchaser of the goods contained in the warehouse. Goods in transit may be sold before arrival and the Bill of Lading endorsed to the buyer as representing his claim to the goods when they arrive. Grain stored in an elevator may be transferred by a delivery of the warehouse receipt for the grain stored.

Protecting Third Parties

22. If it were a matter between the buyer and seller alone the particular position of the tangible articles, after the title to them had passed, would not be a matter of great moment. Where, however, the rights of third persons are concerned, a different situation is presented. Sometimes frauds have been attempted when this condition exists. For instance, a retail merchant makes a private sale of his stock of goods to a friend. No change of ownership is apparent. The same man as usual is seen at the place of business, still conducting it. Wholesale merchants, on the strength of his apparent ownership, sell him goods but, when they come to enforce payment, are informed that he has no assets. His stock was sold to another long ago. It is easy to see what a wrong interpretation may be put on the act of selling goods where there is no actual delivery.

Bill of Sale

23. To protect the buyer, and to avoid any imputation of fraud, in all cases where an actual or a constructive delivery is not possible nor convenient, a Bill of Sale should be executed and registered at

the place appointed in each Province for that purpose. The public is thus given access to the document, and anyone interested may learn who is the real owner of the goods sold. In important transactions, even when actual delivery might make the filing of the Bill of Sale unnecessary, the buyer does well to establish his title by registering a Bill of Sale.

Registering Bill of Sale

24. In Ontario, Bills of Sale are registered for counties in the office of the Clerk of the County Court, and this must be done within five days after the execution of the Bill. For the various districts they are registered within ten days in the office of the Clerk of the District Court. In Manitoba they are registered at the office of the Clerk of the County Court within twenty days. In Alberta, Saskatchewan, and the North-West Territories they are registered at the office of the Clerk of the Registration District within thirty days. In British Columbia they are registered within five days or twenty-one days, according to whether or not the property is within the limits of a city or town in which is situated an office of the County Court. In New Brunswick they are filed with the Registrar of Deeds within thirty days. In Nova Scotia and Prince Edward Island there is no time set, but they hold good against others only after filing. In Prince Edward Island they must be filed in the office of the Prothonotary of the Supreme Court, otherwise they are void against third parties. (Bills of Sale are not used in Quebec.) In Newfoundland, Bills of Sale are required to be registered in the office for the Registry of Deeds. The time limit is 5 days if the documents are executed in the City of St. John's, while elsewhere the time limit is thirty days.

Form of Bill of Sale

25. The following is a form of Bill of Sale, accompanied by the two affidavits necessary. It is interesting to note that, while the affidavit of the witness is the only one usually required, a Bill of Sale and a Chattel Mortgage require an additional affidavit from the one to whom the title is passing, to the effect that the transaction is a bona fide one.

FORM OF BILL OF SALE

THIS INDENTURE, made the fourth day of October, in the year of our Lord one thousand nine hundred and forty-six, between Donald Fraser, of the City of Stratford, in the County of Perth, and Province of Ontario, merchant, vendor of the first part, and Walter Miller, of the City of Stratford, County of Perth, and Province of Ontario, gentleman, the vendee of the second part.

Whereas the said party of the first part is possessed of the stock of dry goods and store and office fixtures hereinafter set forth, described, and enumerated,

and hath contracted and agreed with the said party of the second part for the absolute sale to him of the same, for the sum of ten thousand dollars.

NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration of the sum of ten thousand dollars of lawful money of Canada, paid by the said party of the second part, at or before the sealing and delivery of these Presents (the receipt whereof is hereby acknowledged), he, the said party, of the first part, hath bargained, sold, assigned, transferred, and set over and by these Presents doth bargain, sell, assign, transfer, and set over, unto the said party, his executors, administrators, and assigns, ALL THOSE the said dry goods and store and office fixtures, as per inventory hereunto attached and marked "A".

AND all the right, title, interest, property, claim, and demand whatsoever both at law and equity, or otherwise howsoever, of him the said party of the first part, of, in, to, and out of the same and every part thereof.

TO HAVE AND TO HOLD the said hereinbefore assigned dry goods and store and office fixtures and every of them and every part thereof, with the appurtenances, and all the right, title, and interest of the said party of the first part thereto and therein as aforesaid, unto and to the use of the said party of the second part his executors, administrators, and assigns, to and for his sole and only use forever.

AND the said party of the first part doth hereby for himself, his heirs, executors, and administrators, covenant, promise, and agree with the said party of the second part, his executors and administrators, in the manner following, that is to say: "That he, the said party of the first part, is now rightfully and absolutely possessed of and entitled to the said hereby assigned dry goods and store and office fixtures, and every part thereof; and that the said party of the first part now hath in himself good right to assign the same unto the said party of the second part, his executors, administrators, and assigns in the manner aforesaid and according to the true intent and meaning of these presents, and that the said party of the second part, his executors, administrators, and assigns, shall and may from time to time, and at all times hereafter, peaceably and quietly have, hold, possess, and enjoy the said hereby assigned goods and fixtures and every of them, and every part thereof, to and for his own use and benefit, without any manner of hindrance, interruption, molestation, claim, or demand whatsoever of, from or by him the said party of the first part, or any person or persons whomsoever, and that free and clear, and freely and absolutely released and discharged, or otherwise, at the cost of the said party of the first part, effectually indemnified from and against all former and other bargains, sales, gifts, grants, titles, charges, and encumbrances whatsoever.

And moreover, that he, the said party of the first part, and all persons rightfully claiming, or to claim any estate, right, title, or interest of, in, or to the said hereby assigned goods and fixtures and every of them, and every part thereof, shall and will from time to time, and at all times hereafter upon every reasonable request of the said party of the second part, his executors, administrators, or assigns, but at the cost and charge of the said party of the second part, make, do, and execute, or cause or procure to be made, done, and executed, all such further acts, deeds, and assurances for the more effectually assigning and assuring the said hereby assigned goods and fixtures unto the said party of the second part, his executors, administrators, and assigns, in manner aforesaid, and according to the true intent and meaning of these presents, as by the said party of the second part, his executors, administrators, or assigns, or his counsel shall be reasonably advised or required.

IN WITNESS WHEREOF the said parties to these Presents have hereunto set their hands and seals the day and year first above written.
Signed, sealed, and delivered in
the presence of JOSEPH ORR.
DONALD FRASER. (Seal)
WALTER MILLER. (Seal)

Affidavit of purchaser as to the sale being bona fide for value: County of Perth, To wit:

I, Walter Miller, of the City of Stratford, in the County of Perth, the vendee in the foregoing Bill of Sale named, make oath and say:

That the sale therein made is bona fide, and for good consideration, namely, the actual present payment in the hand to the vendor by the vendee of the sum of Ten Thousand Dollars, and not for the purpose of holding or enabling me, this deponent, to hold the goods mentioned therein against the creditors of the said bargainor, or any of them.

Sworn before me at Stratford, in the
County of Perth, this 4th day of
October, A.D. 1946. WALTER MILLER.
James Mabee, a commissioner for taking affidavits in H. C. J.

Affidavit of witness proving the signing, sealing, and delivery of the Bill of Sale:

County of Perth,
To wit:

I, Joseph Orr, of the City of Stratford, in the County of Perth, make oath and say:

That I was personally present, and did see the within Bill of Sale duly signed, sealed, and delivered by Donald Fraser and Walter Miller, the parties thereto, and that I, this deponent, am a subscribing witness to the same. And that the name Joseph Orr, set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent, and that the same was executed at the City of Stratford, County of Perth, on the 4th day of October, A.D. 1946.

JOSEPH ORR.

Sworn before me at the City of
Stratford, County of Perth,
this 4th day of October, 1946.
James Mabee, a commissioner for taking affidavits in H. C. J.

Bulk Sales Act

26. In most of the provinces a Bulk Sales Act came into force in the year 1918. These Acts provide that when a business is sold the purchaser's duty is to obtain from the vendor a written statement—verified by Statutory Declaration made by the vendor—as to the names and addresses of the vendor's creditors, showing the amount payable to each.

It is provided further that, if these provisions are not complied with, the sale shall be deemed to be fraudulent, and void as against the creditors of the vendor unless all the creditors are paid in full out of the proceeds of such sale.

Any purchaser may obtain a written waiver from the creditors of the vendor or may pay the whole of his purchase money into the hands of a trustee for distribution pro rata among the creditors of the vendor and subject to any preferences such as rent, sales tax, or taxes due any municipality. The trustee's fees are chargeable to the moneys to be received by the creditors.

Where the funds paid into the hands of the trustee are not sufficient to discharge the vendor's debts, the sale will go through if sixty per cent of creditors in number and value of the claims of $50.00 and over consent.

If the provisions of the Bulk Sales Act are not complied with, any creditor of the vendor has the right to begin an action to set aside such sale—if such action is brought within sixty days from the date of the sale or within sixty days from the date when the creditor attacking such sale first received notice thereof.

SALES OF PERSONAL PROPERTY—WARRANTY

"Warranty" Defined

27. A Warranty is an assurance of the existence of some fact, e.g., the quality of goods sold, the validity of a title, the description and uses of insured property, etc. The assurance is coupled with a contract, expressed or implied, which binds the person giving the warranty to make good any deficiency or defect. While a contract of warranty is very often associated with a contract of sale, it must be borne in mind that it is a separate and distinct contract in itself. A perfectly valid contract of sale may therefore be made without the accompaniment of a warranty. A warranty may be given at the time of the sale, or at some time after the sale. If given at the time of the sale, the consideration (or price paid in the sale) is held to be sufficient consideration for the warranty also. If given after the sale, the warranty must be based on new consideration. Thus A and B each bought a bicycle from a dealer for $50.00 When A paid his money, he received. the wheel and a warranty. When B paid his money he received the wheel alone. A week afterwards B heard of A's warranty, and asked the dealer for one also. He must pay for his warranty to make it perfectly good in his hands.

Form of Warranty

28. No set form is prescribed for a warranty. If a dealer in selling a horse should say, "I warrant him to be sound in every way"—this is a warranty. If the horse proved to be lame, there is a breach of warranty and an action may be taken against the dealer for the breach.

It is apparent that a written warranty is to be preferred to a verbal one, for purposes of proof, should dispute arise. Care must be taken to distinguish between a mere representation and a warranty. Every seller is prone to praise his own wares, but he may say a number of things that could hardly be construed as warranties. Thus, the horse may be said to be the finest in the city, without making the seller liable should the contrary prove true. Newspaper advertisements often contain extravagant statements as to the merits of an article, but these statements can hardly be construed as warranties should the articles be bought.

Warranty of Title

29. Warranties are either express or implied, and relate either to quality or to title. When personal property is actually in possession of the one who is attempting to sell it, it is implied that he is the owner and has a right to sell the property. In other words, it would not be necessary to get a distinct warranty as to title from the vendor in order to hold him for damages should third persons claim the things sold and take them from the purchaser. If, however, the things to be sold are not in possession of the one who claims to be the owner, or if some other person puts forward a claim to the property, the one who contemplates buying should be warned by such state of affairs. The title is apparently not good and should be investigated before purchase, or a distinct warranty as to title secured.

Where goods sold have been stolen, the property in them does not pass from the person making the sale, and hence a purchaser does not acquire any title. The thief had no title and has none that he can pass on.

In Quebec, possession creates a presumption of lawful title, so that if anything which was lost or stolen is bought in good faith in a fair, or market, or at a public sale, or from a trader who deals in similar articles, the true owner cannot claim it without reimbursing the buyer to the amount of the price paid. If he reimburses the buyer, the true owner is entitled to claim the article or goods unless the buyer has held the goods for three months in good faith, in which case he has a prescriptive right.

Warranty of Quality

30. As in the case of title, we find that a warranty of quality may also be implied. Thus where goods are bought from a manufacturer, it is implied that they are free from latent defects making them unfit for the purpose for which the goods are intended. If goods are sold by sample or by description, it is implied that they must measure up to the sample or to the description. If, when buying, the purchaser gives

the seller an idea of the use to which he intends to put the goods, there is an implied warranty that they are fit for the use intended.

Let the Buyer Beware

31. Setting aside these cases where the warranty of quality is implied, it must be understood that the rule "Caveat emptor" (let the buyer beware) must apply. In other words, the buyer has two courses open to him. He may rely on his own judgment and be satisfied to take the goods at his own risk, having duly inspected them, or he may demand from the seller an express warranty as to quality. The warranty must, of course, cover the points brought up by the buyer or no sale is likely to result. The buyer's position is thus made very easy. He may have no skill in judging the goods, but he may demand the warranty and thus protect himself.

32. In Ontario a Sales of Goods Act was codified in 1920, covering most of the Common Law requirements.

Sale by Sample

33. There is no sale by sample except where the contract expressly or impliedly says so, and a mere showing of a sample does not make the sale one by sample. In sales by sample it is implied—

(1) that the bulk shall correspond with the sample in quality;

(2) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;

(3) that the goods are free from any defect which would not be apparent on a reasonable examination of the sample.

BREACH OF CONTRACT

Buyer's Remedies

34. Where a person making a sale wrongfully neglects or refuses to deliver the goods, the buyer may sue him for damages for non-delivery. The amount of damages is the estimated loss resulting from the breach. Where there is a market for such goods, this loss would be taken as the difference between the contract price and the market value at the time the goods ought to have been delivered or, if no time for delivery was stated, then at the time of the refusal to deliver. Where there is no market for such goods, the damages will be measured as the difference between the contract price and what the buyer must pay in order to obtain such goods elsewhere, or to obtain substitutes. If no loss results in obtaining a substitute, the damages are nominal only.

Seller's Remedies

35. When the property in goods sold has passed to the buyer or where the price is payable at a certain date whether delivery has been made or not, the seller may sue for the price if the buyer neglects or refuses to pay.

If the buyer refuses to accept goods, the seller may sue him for damages. The amount of damages would be based on the estimated loss to the seller because of the breach.

Examination Questions

COMMERCIAL LAW

Lesson 6

1. What is the legal definition of the term Property?

2. Distinguish between Real Property and Personal Property and show, with illustrations, the two classifications of each.

3. Show, with illustrations, how Property which is Real may become Personal, and *vice versa*.

4. What is a Sale of Personal Property as distinguished from a Mortgage, a Barter, a Gift, or a Bailment? Discuss each (in separate paragraphs) from the point of view of title and possession.

5. Discuss the four general requisites of any contract with respect to the particular contract "Sale of Personal Property".

6. What is the effect of the Statute of Frauds upon a contract for the sale of Personal Property? State details in full as they apply to your province.

7. Discuss the question of when the title passes with respect to (*a*) Specific Chattels; (*b*) Chattels not Specific.

8. How may goods ordered from a distance be shipped to the buyer and still no title pass to him until payment is assured?

9. What is Stoppage in Transitu, and what conditions are necessary to an exercise of the right?

10. What is a Bill of Sale, and what purpose does it serve in a contract for the sale of personal property? What step is necessary to make the Bill of Sale effective against third parties? State fully.

11. What is a Warranty? Discuss this contract with respect to the essential of consideration.

12. How many kinds of Warranty are there, and to what may they relate?

13. A makes a written offer to sell his truck to B for $2,000.00; B writes to A that he will give him $1,500.00; but A notifies B that he will not accept the amount; B then writes A that he

(*Continued on next page*)

will pay him $2,000.00; A now refuses to sell the truck; B takes legal action against A to compel A to sell the truck to him. Can B succeed in the action? Give reasons for your answer.

14. A makes an offer to B to purchase property. B writes to A stating his willingness to agree but changing some terms or dates of payment. A is willing to make these changes but does not send any letter or other notice accepting the changes. Is either party bound? Why?

15. I give a traveller a verbal order for a bill of goods amounting to $60.00, and he sends it in to his employers who deliver the goods. Am I bound to accept and pay for the goods? Does it make any difference as to my liability to pay if I accept the goods, or if I pay $5.00 on account, or if I give the traveller $1.00 to bind the contract? Give reasons.

16. What is the effect in law of the payment of money—

(*a*) Under a mistake of law?
(*b*) Under a mistake of fact?

17. A dealer offers goods for sale by letter through the mail. The person addressed accepts by mail. The letter is delayed or is lost in transmission. Is the dealer bound? Suppose he sent a telegram withdrawing his offer, what effect would it have?

18. What is the rule of law, if any, as to the length of time within which an offer may be accepted, so as to make a binding contract, where no time limit is mentioned in the offer?

19. A prospective purchaser of an automobile called at a sales room and asked the price. He was quoted $1,500.00. He said, "I will give you $800.00 for it". The seller said, "I accept that; the car is yours". Can either party back out? Give reasons for your answer.

20. Give an outline expressing the purpose and provisions of the law regarding Bulk Sales.

21. (*a*) What is the general rule that applies when personal property is affixed to real property?
(*b*) Under what conditions may a tenant remove fixtures that he had purchased and affixed to the real property?

22. (*a*) A stole B's car and sold it to C. B located the car and demanded it from C. State, with reasons, who has the right to the property in the car.

(*Continued on next page*)

(*b*) D stole $20.00 from E and used the money to pay for goods he bought from F. State, with reasons, whether or not E can require F to give him the money.

(Note: In answering (*a*) Quebec students should state the special conditions that apply in that province.)

23. A bought goods from B and after the purchase was completed A left the goods with B until it would be convenient for him (A) to take actual delivery of them. State, with reasons, who should insure the goods against loss by fire or theft.

24. What is implied in a sale by sample?

25. A sold goods to B but neglected to deliver them. What are B's rights against A and on what basis may damages be claimed?

26. On March 1 A sold goods to B for delivery on May 1, payment to be made on April 1. If B fails to pay on April 1, what are A's rights against B?

COMMERCIAL LAW

Lesson 7

SALE OF PERSONAL PROPERTY— CONDITIONAL SALES

Two Forms of Conditional Sale

1. Conditional Sales are of two classes. In conditional sales of one class the title is not supposed to pass to the buyer until the happening of some event—as where one agrees to buy goods provided they are at a certain place at a certain time. This gives us an example of what is known as a Condition Precedent. In the other class the title passes to the buyer, but under certain conditions is liable to revert to the seller—as where a man gives a Chattel Mortgage on some personal property. Here we have an example of a Condition Subsequent.

Lien Notes

2. Perhaps the most common form of sale made under a condition precedent is a sale under which a Lien Note is taken as representing the purchase price, and as giving the seller a hold on the particular article sold until the price is fully paid. It will be understood at the outset that, where a sale is made and time is given to the purchaser in which to pay the price, either by taking an ordinary note from him or by giving him a term of credit, the title ordinarily passes immediately. If the price is not paid at the expiration of the term specified, the seller has a right to enter an action in the usual way for the recovery of the money—but he has no right to take away from the buyer the particular thing that was sold.

If a Lien Note were given, the case would be different. The seller has a right to reclaim the very article that he sold. Otherwise, he would have to proceed against the buyer in a general way, as one who was possibly worth the amount of money that the seller claimed was due to him. Pianos, organs, sewing machines, agricultural implements, gramophones, motor cars and radios are frequently sold under Lien Agreements, and in each of the Provinces we find these sales recognized by the passing of statutes intended very largely to protect the rights of innocent third persons. The following is a form of Lien Note commonly drawn—

SHAW SCHOOLS LIMITED

LIEN NOTE

KIND OF MACHINE ..... Self-Binder .....
Number of Machine ..... 47283 .....
Agent ..... Henry Miller .....

$100.00. Toronto, May 12, 1946.

On the first day of October, 1946, I promise to pay The Massey-Harris Manufacturing Co. Limited, at their office in Toronto, for value received, One Hundred Dollars, with Interest at six per cent per annum, and at the rate of eight per cent after date of maturity until paid. I further agree to furnish security satisfactory to you at any time if required. If I fail to furnish such security when demanded, or should I sell or otherwise dispose of the land or personal property I am now possessed of, then this note is to become due and payable forthwith; and you may retake possession of the article for which this Note is given without process of law, and sell it by public auction or sale, but the taking or selling of said article shall not relieve me of my liability for any balance of the purchase price still unpaid after such sale. The title and right to the possession of the property for which this Note is given shall remain vested in The Massey-Harris Manufacturing Co. Limited, until this Note or any obligation given therefor is paid.

I hereby acknowledge having this day received a copy of this Note.

Lot .....26..... ; Con .....B..... ; Township....Etobicoke;

P.O. Address .....Weston.....

Witness:
J. M. Fraser.

JOHN HENDERSON.

A Lien Note is not a negotiable instrument because the promise to pay is conditional. It has been held by the Ontario Court of Appeal that a note was not negotiable even when it did not expressly reserve the title in the chattel (automobile) to which it referred on the ground that the promise to pay was not "an unconditional promise," as required by Sec. 176 of The Bills of Exchange Act.

The following assignment would be sufficient in such cases—

Date.....

For value received, I hereby transfer to.....

.....the within Note and all my right, title, and interest in the goods and chattels for which the said Note was given.

Signature.....

Ontario Lien Notes

3. In Ontario, the Statute dealing with such sales is known as "An Act respecting Conditional Sales of Chattels". It provides that a conditional sale of manufactured goods shall only be valid, as against subsequent purchasers or mortgagees in good faith, for valuable consideration, if at the time of the sale the name and address of the seller is painted, printed, stamped, or engraved on the article, or plainly

attached to it. If this is not done it is necessary to file a copy of the Lien Note or Agreement at the office of the County Clerk, within ten days. For all other goods and for live stock, registration is necessary. A copy of the Lien Note or Agreement shall be left with the purchaser at the time the paper is signed, or within twenty days thereafter. Should an interested person request a statement concerning the balance due and terms of payment, the manufacturer is bound to furnish this information within five days of the request. If goods are taken by the manufacturer or seller for breach of condition they must be held for twenty days, in which time they may be redeemed by the payment of arrears, interest, and costs. They must not only be held for twenty days, but the buyer must be given five days' notice of re-sale. These five days may form part of the twenty days. If the goods sold have been affixed to any real property the lien is not lost —but the owner of such real property, or any purchaser or mortgagee of it, may retain the goods by paying the amount due on them. Landlords may seize and sell such property for rent, but they must pay the balance of the purchase money.

British Columbia Lien Notes

4. In British Columbia a copy of the Note must be filed within twenty days at the office where Bills of Sale are filed (see Lesson 6, Sec. 24). The articles need not, therefore, bear the manufacturer's or seller's name. Goods taken for breach of condition must be held for twenty days before re-sale.

Five days' notice of re-sale must be given. The seller is bound to give information, within five days, as to amount due and terms of payment. A copy of the Lien Note or Agreement must be left with the buyer at the time the document is drawn up, or within twenty days thereafter.

Manitoba Lien Notes

5. In Manitoba the Note or Agreement need not be filed, but in the case of manufactured goods the name of the manufacturer or seller must be on the article sold. Any applicant is entitled to receive forthwith full information as to the balance due and the terms of payment.

Saskatchewan and Alberta Lien Notes

6. In Saskatchewan, Alberta, Yukon, and North-West Territories, if the agreement is for a sale of $15.00 or over it must be filed in the office of the Registration Clerk for Chattel Mortgages within thirty days. In Saskatchewan the agreement need not be filed if the name of the seller or manufacturer is on the article, and such seller or manufacturer keeps an office within the province where inquiries may be made

and information given. In Alberta and Saskatchewan, goods retaken must be held for twenty days. In the Yukon and North-West Territories such goods must be held for twenty days even though the value is less than $15.00. In all of these cases five days' notice of re-sale must be given, except in Saskatchewan, where it is eight days.

New Brunswick Lien Notes

7. In New Brunswick three things must be done: (1) The name of the manufacturer must be put on the article. (2) A copy of the writing must be filed in the office of the Registrar of Deeds for the county within 15 days. (3) A copy of the Lien Note or Agreement must be left with the purchaser within twenty days. Goods taken for breach of contract must be retained twenty days before re-sale. Five days' notice of re-sale must be given. Information must be given by the seller as to the balance due and the terms of payment within twenty days after inquiry.

Prince Edward Island Lien Notes

8. In Prince Edward Island one of two things must be done. The name of the manufacturer or vendor must be placed on the article sold, or a copy of the Lien Note or Agreement must be filed in the office of the Prothonotary or Deputy Prothonotary within ten days. This does not apply to household furniture—except pianos, organs, and other musical instruments. A copy of the Note or Agreement must be left with the Prothonotary within twenty days.

Quebec Lien Notes

9. In Quebec conditional sales do not need to be registered. If the person buying goods in this way should sell them, the sale would be void. Even if third persons bought the goods in good faith, they must be retaken from them. This would be true except in cases where goods were bought at a fair, or market, or public sale, or from a dealer in such articles.

Protecting Third Persons

10. It will thus be seen that conditional sales are generally recognized by the statutes of the different provinces. While there may be differences in minor details in the law of the provinces, the theory is recognized that innocent third persons who may become subsequent purchasers or mortgagees, without notice, must be protected either by giving them the name of the manufacturer to whom they may apply for information, or by having the note or agreement filed in such a place that easy access may be had to it.

Sales of Goods to Arrive

11. As further examples of sales under condition precedent we

might mention Sales of Goods to Arrive and Sales on Trial. As we have seen previously, it is quite possible for goods in transit to be sold even before they reach their destination. We have also seen that a present sale may be effected in such a case, and the title passed by endorsing the order bill of lading to the buyer. Where this is done, any loss through accident would be upon such buyer. On the other hand, we may have an executory sale that becomes executed only on condition that the goods arrive. In such case the title remains with the seller until the arrival of the goods. If they do not arrive, neither party is bound. Sometimes the seller expressly warrants that the goods will arrive, and if they do not he is liable for breach of warranty. Which one of the forms the contract will take depends upon the intention of the parties, as gathered from their contract. [If no intention is expressed, the presumption is against the passing of the title until the arrival of the goods.]

Sale on Trial

12. In the case of a Sale on Trial, goods are put into the hands of a prospective buyer (without the title passing) with the understanding that he may try them and return them if unsatisfactory. If a time is stated for return, then the goods must be returned within that time —or the buyer becomes absolutely bound. If no time is mentioned, then return must be made within a reasonable time. Sometimes it is agreed that the title shall pass immediately to the buyer, but with the agreement that he is entitled to return the goods if they prove unsatisfactory. This is called a Sale or Return. If goods are lost or damaged in such a case the loss is on the buyer, even if he had not completed his trial or examination.

CHATTEL MORTGAGES

Sale Under Condition Subsequent

13. A Chattel Mortgage is in effect a Bill of Sale with a proviso. The ordinary Bill of Sale transfers absolutely the title to things personal, with no provision for the redemption or recovery of the goods. Such a possibility as the seller wishing to repurchase is not contemplated, although there is nothing to hinder the parties from making a contract to re-transfer the property. In a Chattel Mortgage the title is passed to the one in whose favour the paper is drawn (the mortgagee), but the one passing the title (the mortgagor) is given an opportunity to recover the title by a proviso which says that if the mortgage money is paid on a certain day the title reverts to the mortgagor. The articles which are mortgaged remain in the possession of the mortgagor during the running of the mortgage.

A Weak Security

14. A Chattel Mortgage is given as security for a debt, or for money borrowed, only as a last resort. This form of security is not generally looked upon with favour, especially by banks, because the creditor is dependent upon the debtor's honesty, and the renewal of such mortgage has to be made once a year or other period according to the law of the province.

Form of Chattel Mortgage

15. Chattel Mortgages are used in all the provinces except Quebec. The statutes do not give a form for the paper but, as in the case of a number of other contracts, custom has prescribed a form, and printed blanks are furnished by law stationers. These are filled in according to the nature of each particular contract. A complete form is shown herewith and we recommend that it be read carefully and compared with the Bill of Sale, in order that the exact nature of the contract may be understood.

FORM OF CHATTEL MORTGAGE

THIS INDENTURE made (in duplicate) the fifth day of October, one thousand nine hundred and forty-six.

BETWEEN Simon Fraser, of the Township of East Zorra, in the County of Oxford, Province of Ontario, farmer, hereinafter called the Mortgagor, of the first part; and Alexander McKay, of the Township of East Zorra, in the County of Oxford, Province of Ontario, gentleman, hereinafter called the Mortgagee, of the second part.

WITNESSETH that the Mortgagor for and in consideration of Five Hundred Dollars of lawful money of Canada to him in hand well and truly paid by the Mortgagee at or before the sealing and delivery of these Presents (the receipt whereof is hereby acknowledged), hath granted, bargained, sold and assigned, and by these Presents DOTH GRANT, bargain, sell and assign unto the Mortgagee, his executors, administrators, and assigns, ALL AND SINGULAR the goods and chattels hereinafter particularly mentioned and described, that is to say—

One brown mare, Brino Belle, six years old, 15.2 hands high, white star on forehead. One brown gelding, Little Jack, six years old, 15.2 hands high, white star on forehead. One set double harness. One pneumatic-tired road wagon manufactured by the Premier Carriage Company.

All of which said goods and chattels are the property of the Mortgagor and are now upon the premises situate and known as Lot No. 9 in the Tenth Concession in the Township aforesaid, in the County of Oxford and Province of Ontario, together with all goods and chattels that may be added to or substituted for the said goods and chattels, or any of them as herein mentioned.

TO HAVE AND TO HOLD all and singular the said goods and chattels hereby assigned or intended to be assigned unto the said Mortgagee of the second part, his executors, administrators and assigns, as his or their own proper goods and effects.

PROVIDED ALWAYS, and these Presents are upon this express condition, that if the Mortgagor, his executors or administrators do and shall well and truly pay or cause to be paid unto the said Mortgagee, his executors, administrators or assigns the full sum of Five Hundred Dollars, with Interest for the same at the rate of five per cent per annum, on the fifth day of September, 1947, then these Presents shall be void and every matter and thing herein contained shall cease, determine and be utterly void to all intents and purposes, anything herein contained to the contrary thereof in anywise notwithstanding.

AND the Mortgagor for himself, his executors and administrators, shall and will warrant and forever defend by these Presents all and singular the said goods, chattels and property unto the Mortgagee, his executors, administrators and assigns against the Mortgagor, his executors and administrators, and against all and every other person or persons whomsoever.

AND the Mortgagor doth hereby, for himself, his executors and administrators, COVENANT, PROMISE AND AGREE to and with the Mortgagee, his executors, administrators and assigns, that the Mortgagor, his executors or administrators, or some or one of them, shall and will well and truly pay, or cause to be paid, unto the Mortgagee, his executors, administrators or assigns, the sum of money in the above proviso mentioned, with interest for the same as aforesaid, on the day and time and in the manner above limited for the payment thereof; AND ALSO IN CASE DEFAULT SHALL BE MADE IN THE PAYMENT of the said sum of money in the said proviso mentioned, or of the interest thereon, or any part thereof, or in case the Mortgagor shall attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or any of them, or to remove the same or any part thereof out of the County of Oxford, or suffer or permit the same to be seized or taken in execution without the consent of the Mortgagee, his executors, administrators or assigns to such sale, removal or disposal thereof first had and obtained in writing, THEN, and in such case it shall and may be lawful for the Mortgagee, his executors, administrators or assigns, with his or their servant or servants, and with such other assistant or assistants as he or they may require at any time during the day, to enter into and upon any lands, tenements, houses and premises wherever and whatsoever where the said goods and chattels or any part thereof may be, and for such persons to break and force open any doors, locks, bars, bolts, fastenings, hinges, gates, fences, houses, buildings, enclosures and place for the purpose of taking possession of and removing the said goods and chattels; AND upon and from and after the taking possession of such goods and chattels as aforesaid it shall and may be lawful, and the Mortgagee, his executors, administrators or assigns, and each or any of them, is and are hereby authorized and empowered to sell the said goods and chattels or any of them, or any part thereof, at public auction or private sale, as to them or any of them may seem meet; AND from and out of the proceeds of such sale in the first place to pay and reimburse himself or themselves all such sums and sum of money as may then be due by virtue of these Presents, and all such expenses as may have been incurred by the Mortgagee, his executors, administrators or assigns in payment of the said sum of money, with interest thereon, as above mentioned, or in consequence of such sale or removal as above mentioned, and in the next place to pay unto the Mortgagor, his executors, administrators and assigns all such surplus as may remain after such sale and after payment of all such sum or sums of money and interest thereon as may be due by virtue of those Presents at the time of such seizure, and after payment of the costs, charges and expenses incurred by such seizure and sale as aforesaid.

PROVIDED ALWAYS, nevertheless, that it shall not be incumbent on the

Mortgagee, his executors, administrators or assigns to sell and dispose of the said goods and chattels, but that in case of default of payment of the said sum of money with interest thereon as aforesaid, it shall and may be lawful for the Mortgagee, his executors, administrators or assigns peaceably and quietly to have, hold, use, occupy, possess and enjoy the said goods and chattels without the let, molestation, eviction, hindrance or interruption of the Mortgagor, his executors, administrators or assigns or any of them or any other person or persons whomsoever. AND the Mortgagor doth hereby further COVENANT, PROMISE AND AGREE to and with the Mortgagee, his executors, administrators and assigns that in case the sum of money realized under any such sale as above mentioned shall not be sufficient to pay the whole amount due at the time of such sale, that the Mortgagor, his executors or administrators shall and will forthwith pay or cause to be paid unto the Mortgagee, his executors, administrators and assigns all such sum or sums of money with interest thereon as may then be remaining due;

AND the Mortgagor doth put the Mortgagee in the full possession of said goods and chattels by delivering to him this Indenture in the name of all the said goods and chattels at the sealing and delivery thereof;

AND the Mortgagor COVENANTS with the Mortgagee that he will, during the continuance of this mortgage and any and every renewal thereof, insure the chattels hereinbefore mentioned against loss or damage by fire in some insurance office (authorized to transact business in Canada) in the sum of not less than Five Hundred Dollars, and will pay all premiums and moneys necessary for that purpose as the same becomes due, and will, on demand, assign and deliver over to the said Mortgagee, his executors and administrators the policy or policies of insurance and receipt thereto appertaining. PROVIDED that if on default of payment and of said premium or sums of money by the Mortgagor, the Mortgagee, his executors or administrators may pay the same, and such sums of money shall be added to the debt hereby secured (and shall bear interest at the same rate from the day of such payment) and shall be repayable with the principal sum hereby secured.

IN WITNESS WHEREOF the parties to these Presents have hereunto set their hands and seals.

Signed, Sealed and Delivered
in the presence of
JOHN BRUCE.

SIMON FRASER,
ALEXANDER McKAY.

RECEIVED on the day of the date of this Indenture, from the Mortgagee, the sum of Five Hundred Dollars mentioned,

Witness:
JOHN BRUCE.

SIMON FRASER.

AFFIDAVIT OF MORTGAGEE

ONTARIO,
County of Oxford,
To wit:

I, Alexander McKay, of the Township of East Zorra, in the County of Oxford, gentleman, the Mortgagee in the foregoing Bill of Sale by way of Mortgage named, make oath and say: That Simon Fraser, the Mortgagor in the foregoing Bill of Sale

by way of Mortgage named, is justly and truly indebted to me, the deponent, Alexander McKay, the Mortgagee therein named, in the sum of Five Hundred Dollars mentioned therein. That the said Bill of Sale by way of Mortgage was executed in good faith for the express purpose of securing the payment of the money so justly due or accruing due as aforesaid, and not for the purpose of protecting the goods and chattels mentioned in the Bill of Sale by way of Mortgage against the creditors of the said Simon Fraser, the Mortgagor therein named, or preventing the creditors of such Mortgagor from obtaining payment of any claim against him:

ALEXANDER McKAY.

Sworn before me at the City of Woodstock, in the County of Oxford, this fifth day of October, in the year of Our Lord, 1946:

JOHN SOPER McKAY, J.P. in and for the County of Oxford.

AFFIDAVIT OF WITNESS

ONTARIO,
County of Oxford,
To wit:

I, John Bruce, of the Township of East Zorra, in the County of Oxford, make oath and say:

That I was personally present and did see the within Bill of Sale by way of Mortgage duly signed, sealed and delivered by Simon Fraser and Alexander McKay, the parties thereto, and that the name John Bruce, set and subscribed as a witness to the execution thereof, is of the proper handwriting of me, this deponent, and that the same was executed at the City of Woodstock, in the said County of Oxford, on the fifth day of October, one thousand nine hundred and forty-six.

JOHN BRUCE.

Sworn before me at Woodstock in the County of Oxford, the fifth day of October, in the year of Our Lord, 1946.

JOHN SOPER McKAY, J.P.

Registration

16. As in the case of Bills of Sale, it will be noted that the bona fides of the transaction must be proved by an affidavit of the mortgagee as to the good intent of the parties and the reason for the contract. The document must be registered also, as in the case of the Bill of Sale. (See Lesson 6, Section 24.) The mortgage takes effect as between the mortgagor and mortgagee as soon as executed, but registration is necessary in order to hold the goods against judgment creditors and

subsequent purchasers and mortgagees in good faith for valuable consideration.

Removal of Goods

17. Chattel Mortgages hold the property only in the county or registration district where filed and, in case the mortgagor shall attempt to sell or dispose of the goods or to remove the goods from the county without consent of the mortgagee, then the goods may be seized for breach of covenant and sold to satisfy the mortgage claim. If the mortgagee consents to removal of the goods to another county or district, he should see that a duly certified copy of the mortgage is registered in the proper office of such county or district. If this is not done the goods are liable to seizure and sale under an execution, or they may be sold or mortgaged and the original mortgagee would have no recourse against subsequent purchasers or mortgagees.

The time for filing such certified copy of the mortgage varies in the different provinces. In Ontario the time is two months; in Alberta, Saskatchewan, Manitoba, and Nova Scotia the time is thirty days; in the Yukon and North-West Territories it is three weeks.

Substitution and Wrongful Conversion

18. When a chattel mortgage is given on stock-in-trade that changes in the ordinary course of business, e.g., the stock of a merchant, the mortgage should contain a clause providing for substitution, i.e., as goods are sold they must be replaced by an equal quantity of similar goods. In cases where the chattels do not change in the ordinary course of business there would be no provision for substitution, and if the mortgagor without the knowledge of the mortgagee exchanged one chattel for another it will give the mortgagee the right to take possession.

If the mortgagor disposes of any chattel covered by the mortgage, his act is one of wrongful conversion and the purchaser of the chattel would not acquire any title to it. The mortgagee in that case may enter proceedings against the mortgagor or he may take legal steps to recover the article sold illegally. This, however, will not prevent the mortgagor selling his interest in the mortgaged chattels as long as they are not removed. If he should sell his interest in the chattels, the purchaser would take the place of the mortgagor—and the mortgagee could not interfere.

If the chattels of a tenant are subject to a chattel mortgage and they are seized under distress for rent, there is, from the point of view of the mortgagee, an act of conversion and he may enter action to recover the chattels.

Renewal of Mortgage

19. The nature of the claims which a mortgage gives, against the individual and against the property, has already been explained. (See Lesson 5, Sec. 23.) As the claim against the property is good for a limited time, it is necessary that definite action be taken by the mortgagee before the expiration of that time. If the mortgage is not going to be paid when due it may be renewed, or a new mortgage issued—unless the mortgagee makes up his mind to seize and sell the goods. In Ontario Chattel Mortgages remain in force for one year, as against the property. If renewed, this must be done within the last thirty days of the year. In Manitoba they run for two years, and must be renewed within the last thirty days. In Nova Scotia they run for three years and must be renewed within the last thirty days. In British Columbia they are good for five years, and may then be renewed. In Alberta and Saskatchewan they run for three years and must be renewed before the end of that period. In the Yukon and North-West Territories they run for two years and must be renewed within the last thirty days. Subsequent renewals must be filed annually. In New Brunswick they run for one year, and renewal may be filed within the last thirty days. If renewal is not filed and goods are subject to execution, the holder of the mortgage has still thirty days in which to file his renewal statement. In Prince Edward Island they are effective for ten years from the date of filing and the mortgagee, in order to keep it effective, must file a renewal statement each ten years as long as the mortgage is to be kept alive.

The renewal is an act on the part of the mortgagee who prepares a statement of the debt (including interest and renewal costs) supported by his affidavit, all of which is filed where the mortgage is filed.

If a chattel mortgage is not renewed before it expires, the mortgage remains valid against the mortgagor, but it ceases to hold the chattels against creditors, subsequent purchasers and mortgagees in good faith and for valuable consideration. From this it is apparent that a creditor, whether the debt owing to him accrued before or after the mortgagee's default in not filing a renewal, can take advantage of the mortgagee's failure and seize the chattels. It will be noted, however, that only those who purchase the chattels or give a mortgage on them after the failure to file a renewal would have a claim on the chattels since the reference is to subsequent purchasers or mortgagees.

FORM OF RENEWAL STATEMENT

Statement exhibiting the interest of Alexander McKay of the Township of East Zorra, County of Oxford, in the property mentioned in a Chattel Mortgage,

dated the 5th day of October, 1946, made between Simon Fraser of the Township of East Zorra, County of Oxford, of the one part, and Alexander McKay, of the Township of East Zorra, County of Oxford, aforesaid, of the other part, and filed in the office of the Clerk of the County Court of the County of Oxford, on the 5th day of October, 1946, and of the amount due for principal and interest thereon, and of all payments made on account thereof.

The said Alexander McKay is still the Mortgagee of the said property and has not assigned the said Mortgage. One payment has been made on account of the said Mortgage.

October 4th, 1947. Cash received $225.00.

The amount still due, principal and interest, on the said Mortgage is the sum of three hundred dollars, computed as follows—

Principal	$500.00
Interest, 1 year, ending October 5th, 1947 .	25.00
Renewal costs	3.00
	$528.00
Cr.	
By Cash, October 4th, 1947	$228.00
Balance due	$300.00

COUNTY OF OXFORD,

To wit:

I, Alexander McKay, of the Township of East Zorra, in the County of Oxford, the Mortgagee, named in the Chattel Mortgage mentioned in the within statement, make oath and say:

1. That the within statement is true.

2. That the Chattel Mortgage mentioned in the said Statement has not been kept on foot for any fraudulent purpose.

ALEXANDER McKAY.

Sworn before me at the City of Woodstock, in the County of Oxford, this 5th day of October, A.D. 1947.

JOHN SOPER McKAY,

A Commissioner for taking affidavits in the H.C.J., etc.

Proceedings Upon Non-payment

20. From what has been stated regarding the nature of the claims that a Chattel Mortgage gives to the mortgagee, it is clear that he has three courses open to him at the maturity of the mortgage if the mortgagor is not prepared to pay.

(1) He may exercise the right of one having a title to the goods, i.e., go upon the premises, take possession of the goods and remove them. The terms of the mortgage will tell whether or not the goods seized

may be retained by the mortgagee or are to be sold. If they are to be sold, the money is first applied to the payment of the mortgage, interest, and costs. If there is a surplus after meeting all charges, it will be payable to the mortgagor. If the sale money does not meet the amount due, the mortgagor is still liable for the balance.

(2) He may sue the mortgagor for the amount due on the mortgage. In this case he is throwing aside the lien that the mortgage gives him on the goods, and proceeding against the mortgagor as an individual who owes him an ordinary debt. If he elects to follow this plan, the action must be brought within 20 years in all the provinces except Quebec. Chattel mortgages are not used in Quebec.

(3) He may extend the time for payment by consenting to a renewal, and by filing the renewal certificate as indicated.

Assignment of Mortgage

21. A chattel mortgage may be transferred by assignment. The assignment must be filed in the office where the mortgage is filed.

The filing of an assignment is notice to the public in general, but the assignee should give direct written notice—preferably by registered mail—to the mortgagor so the latter will know to whom to make his payments. If notice is not given and the mortgagor pays the former mortgagee who wrongfully accepts the money, the assignee could not make the mortgagor pay again.

Discharge of Mortgage

22. When a chattel mortgage is paid, the mortgagor should obtain from the mortgagee a discharge of the mortgage. This will be given at the expense of the mortgagor and he should personally see that the discharge is filed at the office where the mortgage is filed.

The following is the statutory form of discharge.

DISCHARGE OF CHATTEL MORTGAGE

DOMINION OF CANADA,

Province of Ontario.

To the Clerk of the County Court of the County of Oxford, I, Alexander McKay, of the Township of East Zorra, County of Oxford, gentleman, do certify that Simon Fraser, of the Township of East Zorra, County of Oxford, Province of Ontario, hath satisfied all money due on or to grow due on a certain Chattel Mortgage made by Simon Fraser, aforesaid, to Alexander McKay, of the Township of East Zorra, aforesaid, which Mortgage bears the date of the 5th day of October, A.D. 1946, and was registered in the office of the Clerk of the County Court of the County of Oxford on the 5th day of October, A.D. 1946, as No. 4144.

That such Chattel Mortgage has not been assigned, and that I am the person entitled by law to receive the money, and that such Mortgage is therefore discharged.

Witness my hand this 5th day of October, A.D. 1948.

ALEXANDER McKAY.

Witness:

MATTHEW MURRAY.

ONTARIO:
County of Oxford,
To wit:

I, Matthew Murray, of the Township of East Zorra, County of Oxford, broker, make oath and say:

1. That I was personally present and did see the within Certificate of Discharge of Chattel Mortgage duly signed, sealed and executed by Alexander McKay, one of the parties thereto.
2. That the said Certificate was executed at the City of Woodstock.
3. That I know the said parties.
4. That I am a subscribing witness to the said Certificate.

MATTHEW MURRAY.

Sworn before me at Woodstock,
County of Oxford, this 5th
day of October, in the year
of our Lord, 1948.

JOHN SOPER McKAY,

A Commissioner for taking affidavits in H.C.J.

Examination Questions

COMMERCIAL LAW

Lesson 7

1. Distinguish, by illustrations, between a Condition Precedent and a Condition Subsequent.

2. Give the salient features of the Statute of your Province respecting Conditional Sales.

3. What is the rule with respect to the passing of the title in: (*a*) Sales of Goods to Arrive; (*b*) Sales on Trial; (*c*) A Sale or Return?

4. Give a definition of a Chattel Mortgage, pointing out the difference between it and a Bill of Sale.

5. Name and describe the parties to a Chattel Mortgage, and state what business relationship brings about the use of this paper.

6. In what way is the bona fides of any transaction into which a chattel mortgage enters established?

7. State the requirements as to filing or registering a chattel mortgage.

8. State the law with respect to the removal of mortgaged goods.

9. Explain the dual nature of the claim which the mortgage gives to the mortgagee.

10. Explain how a mortgage may be kept effective from year to year. In your answer state what steps are taken and by whom.

11. What three courses are open to the mortgagee if the mortgage is not paid at maturity?

12. How may a chattel mortgage be transferred? What steps should be taken by the transferee in order to protect his interests?

13. What procedure should be followed when a chattel mortgage is paid? Refer to the parties to that procedure, indicating the duty of each.

14. Enumerate the different kinds of contracts required by law to be in writing if action taken in the Courts to enforce them is to succeed.

(*Continued on next page*)

15. A grocer in Regina sells his business and enters into an agreement under seal never to engage in the grocery business again. Discuss the validity of such agreements, and if, in your opinion, the agreement is not valid, give an example of a valid contract in such circumstances.

16. I agree verbally, but before witnesses, with a purchaser to sell him a house, the price being fixed, and I receive a deposit of $200.00 on account. The receipt is as follows: "Received from John Smith $200.00 on account of the purchase of 42 King St". Am I bound to go on with the sale?

17. I go to a store and tell a merchant that I will guarantee payment of another man's account, and the merchant supplies him with goods. Am I liable? Give reasons for your answer.

18. In how many years will each of the following outlaw: (*a*) an ordinary debt? (*b*) a promissory note? (*c*) a judgment? From what date does the period of limitation run? Have regard, in your answer, to the different factors that may have a bearing on the question.

19. A gives B a chattel mortgage on his grocery stock-in-trade. What are the requirements of the Bills of Sale and Chattel Mortgage Act which B should observe so that the mortgage shall be a good security as against A's creditors? or subsequent purchasers for value?

20. A purchased a horse from B and after the purchase was concluded, B, in consideration of the previous sale, guaranteed that the horse was sound and free from vice. It was in fact a vicious horse. A sued B for damages. Could he recover in his action? Give reasons for your answer.

COMMERCIAL LAW

Lesson 8

AGENCY—HOW CONSTITUTED

Agency Defined

1. Agency is the legal relation founded upon the express or implied contract of the parties, or created by law, by virtue of which one party (the agent) is employed and authorized to represent and act for the other (the principal) in business dealings with third persons. It is a general rule of law that whatsoever one who is legally competent may do in his own right he may employ an agent to do for him, and that whatsoever is done by the agent within the scope of the power conferred upon him is, in law, the act of the principal. This rule makes possible the legal relationship of principal and agent, and provides a means of carrying out many of the details of a business where it would be impossible for the person in control to do the work personally.

Parties to Agency

2. Viewing the contract of agency in the light of the general requisites of a contract we find, in the matter of competency of the parties, that the principal must be one who is ordinarily competent (see Lesson 2). An agent, on the other hand, may be anyone with a sound mind and understanding. A minor, for instance, while not generally recognized as being competent, may be an agent and bind his principal. An agent, however, may not represent one to whose interests his own are antagonistic. Thus. an agent appointed to buy cannot fairly supply goods of his own, or an agent appointed to sell cannot become the purchaser.

Similarly, an agent may not act for two opposite principals in a transaction requiring the exercise of discretion. Thus if an agent who is employed by one person to obtain a purchaser for property, he to receive commission when the sale is completed, enters into a contract with a prospective purchaser under which he is to receive commission for obtaining the property for him, the agent forfeits his right to any commission. He must account to his first principal for the whole amount realized, and it will depend on that principal whether or not he receives any commission.

Mutual Consent of Parties

3. In the second place, we note that the minds of the parties must meet in establishing the agency. The principal must intend that the agent shall act for him, and the agent must intend to accept the authority and act upon it. The intention of the parties must find expression either in words or in conduct between them.

Consideration

4. In the third place, we note that the element of consideration must be present. The principal who receives services must pay for the same. The terms of the agreement may determine the compensation, otherwise a reasonable return is implied—unless it can be inferred that the services were to be rendered gratuitously.

Lawful Object

5. In the matter of the fourth essential, lawful objects, we note that an agency may be created for any lawful purpose—but authority cannot be delegated to do that which is illegal, immoral, or opposed to public policy.

Power of Attorney

6. The authority given by the principal to the agent may be express or implied. Express authority may be given in writing and under seal, or in writing but not under seal, or verbally. If authority is given to an agent to sign documents under seal on behalf of his principal, the power of attorney must be under seal. On the other hand, if authority is given only to enter into simple contracts such as the signing of cheques, drafts, etc., on behalf of the principal, the power of attorney need not be under seal. The term "power of attorney" is defined usually as a contract of agency under seal. From the foregoing, however, it will be obvious that the requirements as to seal depend on the nature of the agency.

POWER OF ATTORNEY TO SELL SHARES OF CAPITAL STOCK

Know all men by these presents, that I, A. B., of..... for value received, have bargained, sold, assigned and transferred, and by these presents do bargain, sell, assign, and transfer unto C. D., of..... shares of the capital stock of the.....Company, and do hereby constitute and appoint E. F. my true and lawful attorney irrevocable, for me and in my name and stead, to use, sell, assign, transfer, and set over, all or any part of the said stock and for that purpose to make and execute all necessary acts of assignment and transfer (and one or more persons to substitute with like full power), hereby ratifying and confirming all that my said attorney (or his substitute or substitutes), shall lawfully do by virtue hereof.

In witness whereof, I have hereunto set my hand and seal this..... day of....., A.D. 19.....

Signed, sealed and delivered
in the presence of

.....

..... A. B. (L. S.)

POWER OF ATTORNEY AS TO COMMERCIAL PAPER

Know all men by these presents, that I, A. B., do make, constitute, and appoint C. D. my true and lawful attorney, for me and in my name:

1. To draw cheques against my account in the X Bank.

2. To indorse notes, cheques, drafts, or bills of exchange, which may require my indorsement for deposit as cash or for collection in the said bank.

3. To accept all drafts or bills of exchange which may be drawn upon me, and to do all lawful acts requisite for effecting these premises; thereby ratifying and confirming all that the said attorney shall do therein by virtue of these presents.

In witness whereof, etc.

Proving Power of Attorney

7. This Power of Attorney may be proved by being executed in the presence of a notary public who places thereon his attestation of its execution. The power of attorney duly attested is generally given to the agent as a means of fully satisfying third persons as to his authority, even for the signing of important papers not under seal such as notes, cheques, or drafts.

8. As to other express modes of forming the agency, by writing not under seal or by word of mouth, the authority given explains itself. The contract is an ordinary simple one governed by the law of contracts.

Agency by Implication

9. As to implied authority—the rule is that, where one places another in a situation in which that other is understood to represent and act for the person who so placed him, the relation of principal and agent arises by implication. A young man standing behind the counter and dealing with customers in his father's place of business may be considered his father's agent or clerk. If an employer allows his clerk habitually to purchase goods for him on credit, the seller becomes entitled to look to the employer for payment of goods furnished in the ordinary course of dealing.

Ratification

10. A principal who ratifies an act which an agent was not authorized to do becomes responsible for that act. Ratification will also make

a person liable for the acts of others where no actual authority was given to act, or no appearance of authority held out. Of course, an act to be capable of ratification must be one that the principal had power to do, and to delegate the power to do. It is a general rule that an authorized act must be ratified by the same means necessary to confer authority in the first instance. Hence, if sealed authority were required the ratification must be under seal. A ratification may also be implied, as where one takes the benefits of an unauthorized act done on his behalf.

Sub-Agents

11. It is a maxim of law that a delegated authority cannot be re-delegated. An agent cannot, without express or implied authority, hand his duties over to a sub-agent. An agent may, however, without authority employ a sub-agent to do such acts as are merely mechanical. Thus an agent employed to sell a house may employ a sub-agent to look up a list of prospective purchasers. Again, the very nature of the agent's employment may imply authority to hire sub-agents—as where one is placed in charge of a business requiring the services of clerks and bookkeepers. If the sub-agent is employed by express or implied authority of the principal, it is as if the principal has employed him direct. If the agent employs a sub-agent without authority of the principal the sub-agent is not the agent of the principal unless he sees fit to ratify the appointment. If the principal ratifies the sub-agency, then the sub-agent will be compensated by the principal. If the sub-agency is not ratified by the principal, then the agent must compensate the sub-agent.

Universal, General, and Special Agents

12. Agents are divided into a variety of classes according to the nature of their calling, the obligation they assume, and the nature and extent of their authority.

As to the nature and extent of their authority, agents are either Universal, General, or Special.

A Universal Agent is one authorized to transact all the business of his principal, of whatsoever kind. Theoretically such an agency may be possible, but actually it would be very rare indeed.

A General Agent is one authorized to transact all the business of his principal—of a certain kind or in a certain place.

A Special Agent is one authorized to act in a specific transaction only.

Other Forms of Agency

13. Agents are either Professional or Non-professional, according

to the nature of their calling. Among the former are commission merchants, factors, brokers, auctioneers, attorneys-at-law, masters of ships and bank officers.

Agents are either Paid or Gratuitous. Paid Agents are Del Credere or Non Del Credere. A Del Credere Agent is one who undertakes, for an extra compensation or commission, that the person to whom he sells a principal's goods will pay for them or, if the purchaser fails to pay, that he (the agent) will pay for the goods himself.

AGENCY—AUTHORITY

General Rule as to Powers

14. A general agent is empowered to transact all the principal's business of a particular kind, or in a particular place. A special agent is one who is to act only in a specific transaction. It is easy to say exactly what a special agent has power to do. It is well-nigh impossible to describe each act which a general agent may do. At best we can lay down a general rule. A general agent has power to do only those things which are fairly within the scope of the business with which he is entrusted.

15. If a person is dealing with an agent, the extent of the agent's authority is of the utmost importance and should be known. If the agent exceeds the actual or apparent authority created by the principal the latter cannot be held responsible, and third parties cannot establish legal relations with the principal under such conditions. The third party who would establish a right against the principal must show by sufficient evidence:

(1) That the principal did confer authority upon the agent, or

(2) That the principal so conducted himself as to lead the third party to believe that authority had been conferred, or

(3) That the principal ratified the act of the agent.

The necessity of enquiring into the authority of the one who claims to be an agent is easily apparent.

Signature by Agent

16. In order to prove the validity of the agent's authority it is further necessary to show that it is properly exercised. Particularly is this the case where the agent is authorized to sign the principal's name. If the agent has such power then let him always sign his principal's name first and his own after, as a convenience in tracing the history of the transaction. While it is true that with proper explanatory wording

the order may be reversed, the chances are that the agent in signing his own name first is making himself and not his principal liable. This point is well brought out in the Bills of Exchange Act, section 52, which reads as follows—

> "Where a person signs a bill as drawer, endorser or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from liability."

17. Thus if John Jones has authority to sign for William Brown, his safest plan is to sign

William Brown,
per John Jones, Agent.

If his authority comes from a power of attorney he may sign

William Brown,
per pro. John Jones,
(per pro. = by procuration)

If he signs

John Jones,
William Brown's Agent

he is personally liable. The theory is that the mere fact that a man is agent for another does not necessarily import power to sign the principal's name, and furthermore, even if the power is possessed, such a signature does not show intent to sign for the principal. To keep this order and hold the principal liable the signature should read—

John Jones,
Agent for William Brown,

or, John Jones,
for William Brown,

or, John Jones,
for and on behalf of William Brown.

AGENCY—EFFECT OF THE RELATION

Duties of Agent

18. The agent's duties to the principal are: obedience, diligence, skill and loyalty. The principal must be obeyed no matter what the

agent's opinion may be, unless instructions would lead him to do an illegal or immoral act. It will not avail the agent to say that he acted in the best interests of his employer in disobeying instructions. Failure to obey orders is cause for dismissal. The agent may even have made a profit for his principal, and such would belong to the principal. If a loss had been sustained through his disobedience he is responsible for it.

19. It is the duty of an agent to exercise such skill and diligence in the performance of his undertaking as the circumstances justly and reasonably demand. An agent who, through want of ordinary diligence, fails to collect money or receive goods for his principal is liable for the amount or value, with interest.

20. We have it upon the authority of Holy Writ that "No man can serve two masters; for either he will hate the one and love the other, or else he will hold to the one and despise the other". An agent must be loyal to his trust; he cannot be agent in a private transaction for both parties without the consent of both. Neither can an agent reap a secret benefit at the expense of his principal by dealing in the business of the agency for his own profit.

21. Thus an agent to buy may not sell his own goods, nor may an agent to sell become himself the purchaser. The agent must keep regular accounts of all his dealings in the agency. He must be ready, whenever reasonably requested, to present to the principal a full statement of his dealings. The agent must not so mingle the goods or money of his principal with his own as to render them incapable of being distinguished. Thus, in depositing his principal's money in a bank he should deposit it in the name of his principal, or in such a way as to indicate that it belongs to the principal.

Should an agent, acting within the scope of his authority, carry out a transaction in a manner that makes it appear that he himself is the principal and later the other party to the transaction learns that he is an agent, this third party may hold either the agent or the principal. He must decide which he will hold, i.e., the agent or the principal. Having so decided, he cannot change and hold the other party.

Rights of Agent

22. The agent is entitled to remuneration for his services. If there is a special agreement the terms of the contract will settle the amount. If there is no express contract it is implied that the agent is to be paid the reasonable worth of his services.

Liability of Principal to Agent

23. The liability of the principal to the agent is not for remuneration for services alone. If the agent—acting faithfully and without fault—is subject to expense, the principal must indemnify him for such expense. If the agent is sued on a contract made by him, or for an act done according to instructions, here again the principal is liable for damages and expenses. The agent, however, must not expect indemnity for unlawful acts even though the principal expressly promises to indemnify. Such a promise is against the policy of the law.

Liability of Principal to Third Parties

24. In dealing with the matter of the scope of authority we have noticed already that the general rule is that the agent binds the principal and not himself. Special agents bind their principals only in so far as they keep within the scope of their authority. If they pass beyond this, or are guilty of a fraudulent act, they render themselves liable. General agents, acting within the scope of their authority, may bind their principals and render them liable, even for fraud or neglect. Thus, when an operator falls asleep at his post and his negligence causes a collision, the passengers injured do not enter action against the operator or agent but against the company or principal.

TERMINATION OF AGENCY

Methods of Terminating Agency

(1) By agreement—
- (*a*) By performance.
- (*b*) By efflux of time.

(2) By act of parties—
- (*a*) Revocation of principal.
- (*b*) Renunciation by agent.

(3) By operation of law:
- (*a*) Death, insanity, or bankruptcy of principal.
- (*b*) Death, insanity, or bankruptcy of agent.
- (*c*) Destruction of subject-matter of agency.

Termination by Agreement

25. If the agent is given authority to do some specified act, the agency terminates with the performance of that act. If it is agreed that the agency is to endure for a specified time, then it will terminate at the end of that time.

Termination by Principal

26. Speaking generally, the principal has power to revoke at pleasure the authority given to the agent. This rule applies to every authority not coupled with an interest. A distinction may be made between his power to revoke and his right to revoke. If the service was to continue for a definite time the principal has no right, without default by the agent, to discharge him. If he does so, he may be held liable for damages. If, however, the agent does not possess the skill and knowledge he claimed to have, or if he fails to exercise them, or if he acts dishonestly, then the principal has not only the power but the right to dismiss him.

If an agent is engaged to perform a certain act and has performed it, the principal cannot revoke the agency after the act is performed to prevent the agent claiming his remuneration. Thus if A engaged B (a real estate agent) to find him a purchaser for certain real property and B introduced C (a prospective purchaser) to A and some time later C purchased the property, A could not in the meantime deprive B of his commission by terminating the agency. B performed his part of the agreement when he introduced C to A.

Notice of Termination

27. Due notice must be given to an agent that his authority is revoked. The revocation may be given in writing (sealed or unsealed), or orally, or by implication. Even a sealed authority may be revoked by parol. Third parties who have had previous dealings with the agent must also be given due notice, otherwise the principal may still be held liable for the agent's dealings with them.

Termination by Agent

28. Like the principal, the agent may at any time renounce his authority. He cannot be compelled to act, though he may be held liable for breach of contract if there is no reason for his renunciation and the principal can prove damages.

Termination by Death

29. The death of either party terminates the agency. The instant the principal dies his estate belongs to his heirs or creditors, and their rights cannot be affected by any act done by the agent after the death of his principal—even though the agent does not know of the principal's demise.

It should be observed that if a transaction were commenced before the death of the principal and the principal had received some benefit on account of it, his representatives must—if they refuse to go on

with the transaction—hand back any benefits that had been received. They cannot revoke the transaction and keep the benefits as well.

Termination by Insanity

30. The insanity of the principal, occurring after the agency is created, acts as a revocation of the powers of the agent. If the agent becomes insane, his authority is revoked.

Termination by Bankruptcy

31. The bankruptcy of the principal, or his assignment for the benefit of creditors, divests the agent of any authority touching any rights of property of which the principal was divested by reason of his bankruptcy or assignment. The bankruptcy of the agent revokes his authority, unless the act to be performed is merely formal. The law presumes that, by the act of bankruptcy, the confidence of the principal in the agent is destroyed.

Termination by Destruction of Subject-Matter

32. The destruction of the subject-matter terminates the agency. Thus if one employs an agent to sell a horse and the horse dies, the agency is terminated.

PARTNERSHIP—NATURE AND FORMATION

Partnership Defined

33. A Partnership is the relation which subsists between persons carrying on business in common with a view to profit.

This relation arises from a contract between the partners by which they agree to contribute their money, goods, labour, or skill (any or all of them) to the prosecution of some lawful business, with the understanding that there shall be a sharing of gains and losses between or among them. The term "firm" or "co-partnership" is used in referring to a partnership business. A partnership should not be referred to as a "company".

Determining Who are Partners

34. Where there is a written agreement, or articles of partnership, as they are called, the question as to who are partners is easily answered. Where there is no such express agreement, the existence or non-existence of a partnership is determined by the intention of the parties. If it can be shown that two or more persons have a community of interest for business purposes, that each is making a contribution to the common undertaking, that they are sharing gains or losses, their intention to become partners is almost conclusively presumed. One

of these tests alone would not be sufficient. Thus an employee may receive a share of the profits as salary without becoming a partner. In a similar way a person may receive payment of a debt by instalments or otherwise out of the accruing profits of a business without becoming a partner. The widow or child of a deceased partner may receive by way of annuity a portion of the profits made in the business in which the deceased person was a partner, without becoming a partner. A person may lend money to one engaged in business (or about to engage in business) with the understanding that the lender shall receive a rate of interest varying with the profits, or that he shall receive a share of the profits arising from a carrying on of the business, without the lender becoming thereby a partner in the business. In all the above cases the contract should be in writing and signed by, or on behalf of, all of the parties thereto.

Effect of Relation

35. The effect of the partnership relation is to make each partner the general agent of the firm for the transaction of the firm's business and, unless liability is limited by agreement, each partner is liable for the entire debts and undertakings of the firm.

Methods of Forming Partnership

36. A partnership may be formed by express agreement, or by implication. The express agreement may be oral or written. The latter is always to be preferred. A true partnership is rarely, if ever, formed by implication. Still, as we have seen, intention to become partners may be presumed from certain actions, even where there may have been no deliberate agreement. It is also possible for one to assume the liability of a partner to third persons by holding himself out to be a partner or knowingly permitting himself to be held out as a partner. In such a case it does not matter whether the person holding out receives profits or not.

Articles of Partnership

37. The following form will serve to illustrate how Articles of Partnership may be drawn—

ARTICLES OF PARTNERSHIP, made at Toronto, Ontario, this 1st day of August, A.D. 1946, between Joseph Moore, William Peters, and Thomas Jones, all of said city, witnesseth:

(1) The parties hereby form a partnership, for a period of ten years from the 1st day of September, 1946, under the firm name of Moore, Peters & Co., in the trade and business of merchants and dealers in dry goods, carrying on business at 245 Yonge St., in said City of Toronto, or elsewhere. It may be terminated at any time by any of the partners on ten months' previous written notice. The capital is fixed at nine thousand dollars ($9,000.00), and brought in by the partners in the following proportion: Four thousand dollars ($4,000.00) each,

by said Joseph Moore and William Peters, and one thousand dollars ($1,000.00) by said Thomas Jones, and the same shall be paid in as follows: Two thousand ($2,000.00) each by said Moore and said Peters on said 1st day of September, and two thousand dollars ($2,000.00) each additional within sixty days thereafter, and one thousand dollars ($1,000.00) by said Jones, on the 1st day of January, 1947; and in appropriating profits and losses, interest shall first be allowed to said Moore and Peters, respectively, at 6 per cent, on the sums paid in by them from the date of payment until said 1st day of January, 1947, or such time as said Jones shall have paid in said sum of one thousand dollars ($1,000.00).

The profits and losses shall be apportioned among the partners in the proportion of their respective contributions to the capital, and the profits shall be divided on the first Monday of April in each year.

Said Moore and said Peters may draw from the concern, for their own use, not to exceed in any quarter, two hundred dollars ($200.00), on which interest at the rate of 6% per annum shall be charged in dividing the profits. A full inventory and balance sheet shall be made up on the first Monday of April, and on the same day of each year thereafter, and a record thereof kept. Said Jones shall have full charge of said business, and devote his entire time to the same, and shall render an account to his co-partners whenever required, and shall be paid a salary of two hundred dollars ($200.00) per month, payable on the last day of each month. The other partners shall not be required to devote any time to said business.

No partner shall make himself personally liable, or sign individually for any one, any instrument, as surety, guarantor, or the like, without first obtaining the written consent of the other partners.

Upon the dissolution of the partnership from any cause except death, each partner shall have the privilege of submitting a bid for the entire business and goodwill, and the one making the highest offer shall succeed to the said business, and after the debts are paid the partners retiring shall receive such part of the balance of the amount bid by the partner succeeding to the business as his interest in the business bears to the entire business.

IN WITNESS WHEREOF we hereunto subscribe our names this first day of August, 1946.

JOSEPH MOORE,
WILLIAM PETERS,
THOMAS JONES.

General Partnership

38. Partnerships may be spoken of as General or Special if we have in mind the extent of the liability incurred by each partner. They are trading or non-trading, according to the business carried on.

39. A General Partnership is one in which the partners are liable jointly for the debts of the firm, and each member is also personally liable if the partnership assets are not sufficient to pay the debts of the firm in full. General partners are classified as follows—

(1) Dormant, silent or sleeping partner—one who has an interest in the business, but whose name and activities do not appear.

(2) Ostensible partner—one who is held out to the public as a partner, but who has no financial interest in the business.

(3) Actual partner—one who has an interest and whose name appears.

All are liable as general partners.

Limited Partnership

40. A Limited Partnership is one composed of one or more general partners and one or more special or limited partners. The latter are not liable beyond the amount contributed to the capital of the firm. It is impossible to have a partnership in which all partners are thus limited in liability. There must be at least one general partner who will actively manage the business. A limited partner may privately give advice and consult with his co-partners relative to the progress of the business—but if he outwardly takes any active part in the management he becomes liable as a general partner.

Trading and Non-trading Partnerships

41. A Trading Partnership is one conducted for buying and selling and for the usual commercial pursuits—except banking, railways, and insurance. Other firms, such as law firms or medical firms, are known as Non-trading Partnerships. A partner in a non-trading firm has no implied authority to bind the firm by signing commercial paper, nor has he power to borrow on the credit of the firm. In Quebec the rule is different. Such non-trading or civil partners may bind themselves as a firm, but the liability is joint and each partner is even then liable to creditors only in a share proportionate to the number in the firm.

Partnership Name

42. As a general rule a partnership adopts a name, style, or title under which it does business. While this name usually mentions the names of the several partners, it is not necessary that it should do so. A silent partner would not want his name to appear. A limited partner must not have his name appear (unless he is clearly designated as a limited partner in a line beneath the name of the partnership). Beyond this no particular restriction is put upon the choice of a firm name except that it must not be the same as that of any other registered firm, or so like it as to cause confusion.

If a person trades alone under a name that implies a partnership, he must register a certificate giving full particulars including the fact that no one is associated with him. In Quebec, such a person trading under a name other than his own must not only register as a partnership but wherever the name is used in printed material it must be

followed by the word "registered". Failure to comply with the above involves a penalty not exceeding $200.00.

Registration of Partnership

43. That the public may know who really comprise the firm and what kind of partnership it is, registration is required if the partnership is for trading, manufacturing, or mining purposes. In the case of a limited partnership, the general rule is that it is not considered to be formed until it is registered. Any business done before registration makes all partners liable as general partners. In Ontario, limited partnerships are registered at the office of the Clerk of the County or District Court where the principal place of business is situated; in Manitoba at the office of the Judicial District, and if it is not in a Lands Title District the certificate must also be filed with the Registrar of the Registration District; in British Columbia, with the Registrar of the County Court; in Saskatchewan, with the Registration Clerk of the Registration District; in Alberta, North-West Territories and in the Yukon, with the Deputy Clerk of the Supreme Court for the Judicial District; in New Brunswick, at the office of the Registrar of Deeds; in Nova Scotia, with the Registrar of Joint Stock Companies; in Quebec, with the Prothonotary of the Superior Court of the District and with the Registrar of the County; in Newfoundland, in the office of the Colonial Secretary and with the Registrar of Deeds of each district where there is a place of business.

It should be kept in mind that the certificate of a limited partnership must be filed before the firm commences business, or, as pointed out, it will be a general partnership.

44. Some time is generally allowed for the registration of general partnerships. In Ontario, they must be registered within sixty days after formation at the Registry Office for the Registry Division in which the business of the partnership is carried on. In Manitoba the time is one month, and they are registered for the Eastern Judicial District at the office of the Clerk of the Court of King's Bench, and for the Western Judicial District with the Deputy Clerk of the Crown and Pleas. In British Columbia they must be registered within three months with the Registrar of the County Court. In Alberta, Saskatchewan, and North-West Territories the time is six months, and with the Clerk of the Registration District. In New Brunswick they must be registered before business is done, and at the office of the Registrar of Deeds. In Nova Scotia they are to be registered with the Registrar of Joint Stock Companies before commencing business. In Quebec the declaration is required to be filed within 15 days after the formation of the partnership with the Prothonotary of the Superior Court of the District. In Prince Edward Island they must be registered

within three months after formation in the office of the Deputy Prothonotary of the Superior Court.

A person who trades under a name other than his own or adds "& Co." to his name is required to register particulars in the office where general partnerships are registered.

In Quebec, a married person carrying on business whether alone or as a partner must also register with the Prothonotary of the Superior Court of the district within 15 days from the date of commencing business or from the date of marriage a declaration stating whether he is in community of property or separate as to property. If in community of property, the declaration must state whether this is by marriage contract; and in case of separation as to property, the declaration must state whether this is by marriage contract or by judgment.

A married woman (in Quebec) who is "separate" as to property may not carry on a trading business until she delivers to the Prothonotary and to the Registrar of the Registry Division where she will carry on business a declaration stating her intention to trade in that district, her name in full and that of her husband, and the firm name of the business.

Quebec and Nova Scotia students refer also to Lesson 9, Sec. 26.

Powers of Partners

45. As has been stated, each member of an ordinary partnership has the power of a general agent for the firm. He may bind the firm in all matters that come within the scope of the business carried on by the firm. Articles of agreement may divide the work, giving to each partner power to do certain things while restricting his authority to do other things. Articles of agreement are not public documents, and persons doing business with the firm are not affected by such restrictions unless they are aware of them. They have the right to assume the general agency of each partner unless notified to the contrary. Thus it comes that a general partner may be considered as having power to bind the firm by contracts made in the firm name, provided they are contracts for carrying on in the usual way business of the kind carried on by the partnership. Naturally, he is not supposed to use the firm name for private purposes. Anyone who takes from a partner (for a private debt) a note signed by the firm name cannot hope to collect such note from the firm. If the note is negotiated to a holder in due course, such holder could enforce it against the firm.

Partner Suing Firm

A partner could not sue the firm as that would amount to entering

action against himself. As the firm is not an entity separate from its members—as a corporation is—the firm cannot be sued as an individual. It would be necessary to sue the partners trading under the firm name. If a partner has a claim against the firm he can assign it to another person who may then sue the members of the firm, or the partner may sue the other members of the firm for an accounting.

PARTNERSHIP—DISSOLUTION

Dissolution of Partnership at Will

46. A partnership may be for a fixed term—as marked by a certain amount of work to be done or a certain time to elapse—or it may be a Partnership at Will, that is, formed for no specified time.

A partner may withdraw from a partnership at will simply by giving notice to his co-partners. The dissolution of the firm would date from the notice. In the case of a Partnership for a Fixed Term, the completion of the work or the expiration of the time gives any partner the right to withdraw and thus dissolve the firm. If such a partnership is continued without further agreement it becomes a partnership at will, and all the terms of the old agreement (except as to time) remain in force.

Dissolution of Partnership for Fixed Term

47. Partners may naturally agree to dissolve a partnership for a fixed term before the expiration of such term. In such a partnership any partner would have the *power* to withdraw before the expiration of the term, even without the consent of his co-partners, but he would have no *right* to do so. For such breach of his agreement, he would be liable to his associates in an action for damages.

Dissolution by Decree of Court

48. Subject to any agreement between the partners, a partnership is dissolved:

(*a*) If entered into for a fixed term—by the expiration of that term.

(*b*) If entered into for a single adventure or undertaking—by the termination of that adventure or undertaking.

(*c*) If entered into for an undefined time—by any partner giving notice to the other or others of his intention to dissolve the partnership.

On application made by a partner the Court may order a dissolution of the partnership in any of the following cases--

(*a*) When a partner is found to be a lunatic or is shown to the satisfaction of the Court to be of permanently unsound mind.

(*b*) When a partner becomes in any other way permanently incapable of performing his part of the partnership contract.

(*c*) When a partner has been guilty of such conduct as in the opinion of the Court is calculated to prejudicially affect the carrying on of the business.

(*d*) When a partner wilfully commits a breach of the partnership agreement or so conducts himself that it is not reasonably practicable for the other partner or partners to carry on the business in conjunction with him.

(*e*) When the business of the partnership can only be carried on at a loss.

(*f*) Whenever, in any case, circumstances have arisen which, in the opinion of the Court, render it just and equitable that the partnership be dissolved.

Dissolution by Happening of Events

49. Certain events may cause the dissolution of a firm without decree of court—

(*a*) The death of a partner.

(*b*) Marriage of a female partner in some of the provinces.

(*c*) The sale of the share of a partner, either voluntarily or because of being seized under a writ of execution.

(*d*) An assignment by the firm of all its property for the benefit of creditors, or the assignment of a partner of all his property for the benefit of his individual creditors, i.e., the insolvency of a partner.

(*e*) The completion of the enterprise for which the partnership was formed, or the expiration of a period for which it was formed.

50. In many cases where a partner's interest is sold it may be that it is bought by one of the remaining partners or, if it is sold to some other person, it is with the understanding that this person will be taken into the firm. It is nevertheless true that the old firm is dissolved, a new agreement would have to be drawn up, and the certificate registered.

In case a partner's interest is liable to seizure under execution the Court may, on application—and in order to prevent the disruption of

the business—appoint a receiver to take charge of such partner's profits and apply them to the satisfaction of the claim against him. Such receiver can have no part in the management of the business, nor can he inspect the books of the firm.

Registering Dissolution

51. When a dissolution takes place a notice must be registered in the office where the formation of the partnership was recorded. Notice must also be given by advertisement in the official Gazette of the province, or in the Canada Gazette if the business extended to other provinces. It is also customary to advertise the dissolution in the local press and to send a circular letter announcing the dissolution to each person or concern with which business has been done.

It is peculiarly to the advantage of the retiring partner to look after the registration of the dissolution if he would free himself from future liabilities of the business. His withdrawal from the firm will not free him from liabilities incurred while he was a member of the firm. Nothing but a release from the individual creditors of the firm will do that. As regards future liability, a notice of dissolution in the Gazette is sufficient notice to persons who have had no dealings with the old firm. Persons who had dealings with the old firm, however, are entitled to actual notice, and nothing less than actual notice will suffice to protect the retiring partner from liabilities incurred to such persons by the other members of the firm after his retirement.

Powers After Dissolution

52. After dissolution the partners are no longer the agents of the firm to carry on its business in the ordinary way. Any powers that remain to them relate to the winding up of the business. Each partner has power to dispose of the firm's assets for the purpose of paying partnership debts or of converting such assets into money for distribution. After dissolution a partner has not power to create any new contract or indebtedness against the firm—except where proper notice of dissolution has been neglected.

Creditors vs. Partners

53. If insolvency is the cause of the affairs of the firm being wound up, the partnership creditors have a right to payment out of the firm property before the private creditors of a partner can have anything from it. On the other hand, these partnership creditors—if they attempt to levy on the private estate of a general partner—will find that private creditors of a partner have a priority of claim against such private estate.

Distributing Partnership Assets

54. In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed—

(*a*) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

(*b*) The assets of the firm, including the sums (if any) contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order—

(1) In paying the debts and liabilities of the firm to persons who are not partners therein.

(2) In paying to each partner rateably that which is due from the firm to him for advances (loans) as distinguished from capital.

(3) In paying to each partner rateably what is due from the firm to him in respect to capital.

(4) The ultimate residue (if any) shall be divided among the partners in the proportion in which profits are divisible.

MASTER AND SERVANT

Agent vs. Servant

55. The law of master and servant runs parallel in many respects to that of principal and agent. All agents are servants, in the widest sense of the term. This distinction may be noted—the agent is employed to bring his employer into legal relations with third persons, while the servant is employed to perform labour under the direction of his employer. The same person may act as servant at one time and as an agent at another time.

Competency of Parties

56. Let us look at the contract between master and servant in the light of the general essentials that we expect to find in any valid contract. It will be noted, in the matter of competency of persons, that both master and servant must have legal capacity to contract. In the case of a minor, it has been held that binding himself as an apprentice for instruction in a useful trade or art is an act beneficial to the minor and therefore valid—provided the wages are fair and no undue advantage is taken by the master. Otherwise, the usual rule

must apply that a contract by a minor for his services is voidable by him at his option.

Consent of Parties

57. There must be mutual consent, that is there must be an agreement by the master evidenced either by his express words or by his conduct to take the servant into his employ and to pay him wages, and a corresponding agreement by the servant to enter the service upon the terms proposed. In the absence of an express contract, the hiring may be presumed from the fact of the service. Thus if one person serves another as bookkeeper for a certain period, the law presumes that the service is rendered in fulfilment of a contract of hiring, and if nothing is said about wages the law presumes that the parties agreed upon such wages as are customary or reasonable in that line of employment. If the service is with a parent or near relation a hiring is not presumed, and must be expressly proved to support a claim for wages.

Consideration

58. There must be consideration. The master gets services and the servant must get wages. These wages need not necessarily be paid in money, although this is presumed unless there is a distinct agreement to the contrary. Sometimes employees are paid a stated percentage of the profits of the employer's business, either in lieu of or in addition to wages or salary. Such agreements should invariably be in writing, and should be carefully prepared in order that the contract may not be construed as one of partnership. Thus the agreement should make it quite clear that there is no community of interest that would involve the sharing of losses by the employee.

The agreement to share profits does not give the employee any right to examine his employer's books of account.

Lawful Object

59. The object of the contract must be lawful. A contract by which one man agrees to serve another in an illegal business is not enforceable by either. A contract of hire upon terms which are in restraint of trade—and calculated to prevent that fairness of competition between the parties in their subsequent careers which should exist between all men—is regarded with great disfavour by the law. An example would be a contract by which one promises to work for another for a year at a stated salary and undertake, upon leaving his master's service, not to establish himself in the same line of business. Contracts by which a servant binds himself for an oppressively long time are viewed in the same light. In Ontario no voluntary contract of service is binding

on any of the parties for a longer term than nine years from the date of the contract.

When Written Contract is Required

60. The provisions of the Statute of Frauds that no action shall be brought upon any agreement not to be performed within a year, unless it be reduced to writing, must be kept well in mind in this connection. A verbal contract of hiring, which is capable of being performed within a year from the time of making, is valid; but a contract which is not to go into operation for a year, or which is to hold the parties together longer than a year, must be in writing and signed by the party to be charged or by his duly authorized agent.

Form of Contract

61. The following is an illustration of a contract between master and servant—

AGREEMENT

THIS AGREEMENT made (in duplicate) this 3rd day of October, in the year nineteen hundred and forty-six between Anson Brown, of the City of Toronto, Merchant, and Charles Dunn, of the City of Toronto, Bookkeeper, witnesseth:

THAT the said Charles Dunn hereby covenants and agrees that he will, for the term of five years from date of agreement, for the consideration hereinafter mentioned, serve the said Anson Brown in the capacity or position of bookkeeper in his factory in the said City of Toronto, and shall and will during the term aforesaid faithfully and truly fulfil all duties pertaining to that position; that he will obtain and perform all reasonable orders and direction of the said Anson Brown; that he will keep secret the business of the said Anson Brown, and will not disclose any matter or thing connected with or relating to his employment or the general business of the said Anson Brown which might or could prejudice the said Anson Brown, nor of his connection with any other person whomsoever; that he will from time to time and whenever directed prepare and deliver unto the said Anson Brown a true and correct statement of the books and affairs under his charge, showing in detail a statement of all moneys received and paid out, and of all goods and commodities which were at any time received or delivered on account of the said Anson Brown to be sold and exhibited, shall be so prepared that a verification thereof by original books of the said Anson Brown may be made without any trouble.

AND the said Anson Brown hereby agrees to pay unto the said Charles Dunn the sum of $100.00 per month during the term aforesaid, or during such terms as the said Charles Dunn shall faithfully serve the said Anson Brown.

IN WITNESS WHEREOF the said parties to these presents have hereunto set their hands the day and year above written.

CHARLES DUNN,
ANSON BROWN.

Executed in the presence of
JAS. BROWN,
Witness.

Master's Rights

62. The master has a right to the entire time and attention of the servant during the hours contracted for, and for the period specified, or until the contract is legally terminated. He has also a right to obedience to his orders and to expect that the servant will be faithful and honest. If the servant is dishonest or wilfully disobedient or unskilful or incompetent, the master may dismiss him even before the expiration of the contract and, if the servant's conduct has been such as to cause injury or loss, the master may maintain an action for damages against him. An action may also be maintained in case the servant fails to enter upon the service of the master as he contracted to do, or in case he fails to remain for the entire time agreed upon—unless there is good reason, such as permanent sickness. The servant is also responsible to his master in damages for any fraud or wrongful act which renders the master liable in damages to third persons.

Servant's Rights

63. The servant has a right to be received into the services of the master as agreed upon. He has a right to employment for the term stipulated or until the duties mentioned in the contract are performed. He has a right to wages for services rendered. He has a right to expect that tools, appliances, or machinery provided for his use shall be reasonably safe, that fellow workmen employed to assist him shall be reasonably competent, and that reasonably safe premises shall be provided in which to work.

64. From the above the idea of "Workmen's Compensation Acts" will be easily appreciated. Each of the various provinces has its own Workmen's Compensation Act. The general principles are much the same—but anyone who is concerned about the details should study the Act of his own province. Under the Workmen's Compensation Acts, compensation for accidents is made a charge upon the industry concerned instead of a liability of the individual employer. The fund from which compensation is paid is made up of compulsory contributions from employers grouped in classes and assessed according to the hazard of the industry.

Master's Liability

65. The liability of a master on the contracts of his servant is controlled by the same principles which govern the relation of principal and agent. The master is liable for such contracts as he expressly authorized the servant to make. He is also liable for such contracts as the servant entered into within the apparent scope of his employment, no matter what his private instructions may have been. He is liable for acts done outside the servant's employment if he adopt and

ratify such acts. The master is liable in damages to a third person for negligence of his servant in the course of his employment, and even for wilful, wrongful, and unlawful acts committed within the scope of the servant's employment, whether contrary to the master's instructions or not.

Servant's Liability

66. The servant is liable to third parties for contracts in which he does not disclose the fact of his agency. He is liable for wrongful acts done in the course of his employment, even at the command of his master. He is also criminally liable for criminal acts knowingly committed in the master's service.

Notice to Quit

67. If a servant is hired for a definite period (as for one week or for one day), the servant may leave without notice or the master may discharge him without notice at the expiration of the period for which he was engaged. If the hiring is for no definite term then reasonable notice is required. If hired by the week, then one week's notice is customary; if hired by the month, one month's notice; if hired by the year, reasonable notice. What amounts to reasonable notice depends on the circumstances and, in an action, is a question of fact to be decided by the jury. In some cases, one month's notice has been held to be reasonable—in other cases, three, six, or twelve months' notice have been required. The servant must give such notice if he is quitting, or the master must give such notice if he is discharging the servant. Of course, the master may discharge the servant without notice by the payment of a week's or a month's (or other period) wages, as the case may be.

Where the period has expired for which an employee was engaged, or the work he undertook is completed, the contract is at an end—so the employee may leave or the employer may dispense with his services.

Wrongful Dismissal

68. A servant who has been wrongfully dismissed has three courses open to him. He may at once bring an action for damages to the amount of the wages agreed to be paid. He may treat the contract as rescinded and sue for the reasonable value of services already rendered. He may wait till the expiration of the contract and then sue for all the wages agreed to be paid to him, less such wages as he has been able in the meantime to earn from others. It is the duty of the servant, in case of wrongful discharge, to make every reasonable effort to secure other employment.

Examination Questions

COMMERCIAL LAW

Lesson 8

Note.—You will submit written answers for Questions 1, 2, 5, 7, 8, 21, and 26 to 35 inclusive. If you are in doubt as to the correct answers for the remaining questions, kindly consult our Instruction Department.

1. What do you understand by Agency?

2. Discuss Agency in the light of the four general requisites to a contract.

3. Draft the form of a Power of Attorney by which you would give to Richard Doe the authority to sign the stock book of the Brown Manufacturing Company, Limited, and thereby to subscribe for ten shares of the stock of said company.

4. Write a note on (*a*) ratification, (*b*) sub-agents.

5. Classify agents, giving a description of each kind.

6. If you have authority to sign for John Doe, give at least four ways in which you may properly sign.

7. Give a short statement of the duties and rights of an agent.

8. What is the liability of the principal to the agent? To third parties?

9. In how many ways may an agency be terminated?

10. How is the relation of partnership created and what is the effect of the relation being created?

11. What tests will well-nigh conclusively prove the existence of the partnership relation?

12. Classify partnerships and describe the different kinds of partners.

13. Give an outline of the requirements concerning registration of partnerships. Answer in terms of your own province.

14. What are the powers of a partner?

15. Discuss dissolution of partnership in the light of various terms for which a partnership may be formed.

(Continued on next page)

16. When may a partnership be dissolved by decree of court? By result of certain events happening?

17. How is public notice of a dissolution of partnership given?

18 Contrast the powers of a partner after the dissolution of a partnership with his power previous to dissolution.

19. Give the order in which partnership assets are distributed.

20. Discuss the contract between master and servant in the light of the four general requisites to a contract.

21. In what way has the Statute of Frauds a bearing on the contract between master and servant?

22. What rights accrue (*a*) to the master (*b*) the servant?

23. Explain the general theory of Employers' Liability Acts.

24. Discuss the liability of the master to a third person.

25. What notice is customary in terminating the relation between master and servant?

The Following Questions taken from Various Examination Papers Bring Out the Application of the Law in Specific Cases.

26. A and B are carrying on business in co-partnership and wish to change the partnership into a limited partnership, in which A is to be a limited partner and B a general partner. What steps should be taken to effect this change?

27. (*a*) A is an agent for B and, in transacting some of B's business, A enters into a contract with C, but makes the contract as though he (A) were the principal. C afterwards ascertains that A in reality made the contract as agent for B. What rights has C against A and B (or either of them) to enforce the contract, and what are the rights of B under the contract?

(*b*) State the general rules governing the delegation of his authority by an agent to another party.

28. (*a*) What provisions should a properly drawn business partnership agreement contain?

(*b*) Can an employee, without incurring the liability of a partner, be paid by his employer a share in the net profits of the employer's business in addition to his salary?

(*Continued on next page*)

(*c*) Has this employee the right to inspect his employer's books of account?

29. What courses are open to a servant who has been wrongfully dismissed?

30. (*a*) Define: (i) general agent; (ii) special agent.
(*b*) What is a Power of Attorney? Explain when it is necessary that a power of attorney be under seal.
(*c*) Can a person under the age of 21 years act as agent for another person? State the reason for your answer.

31. A is carrying on a hardware business and enters into an agreement with B, one of his salesmen, whereby he agrees to pay B a share in the annual net profits in lieu of salary.

(*a*) Does this agreement make B a partner in the business so that he is liable to the creditors of the business? Give reasons for your answer.

(*b*) What are the rights of B under such an agreement?

32. Define briefly "Partnership" and "Limited Partnership" and state what are the creditors' rights against each concern, and against the members thereof.

33. A contract is made with a man who is really an agent for another, but the contract does not name the other, or say that the agent was merely an agent. Can the other party to the contract hold the principal instead of the agent if he desires?

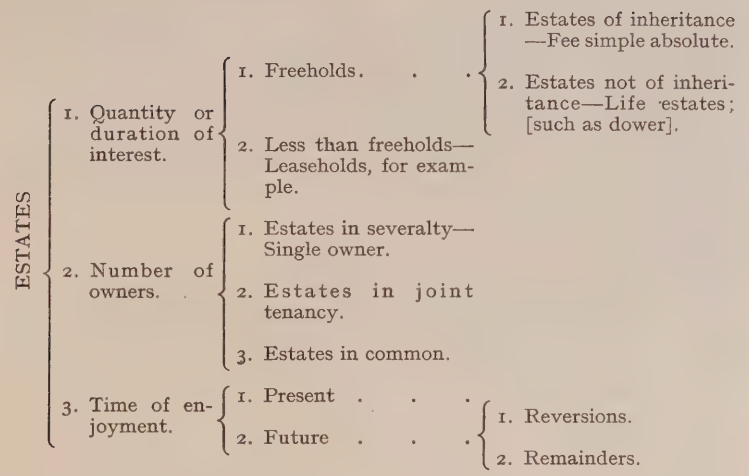
34. A property is placed with an agent for sale. The owner and agent discuss prices, and the owner names his minimum price. The agent meets a man who wants to buy this property and is willing to pay the minimum price and also to pay the agent a commission for securing the property. Can the agent put through the sale and get commission from the seller, nothing further being said?

35. A Power of Attorney was given. The person giving it died. After his death, the attorney sold a property under the power of attorney and received the purchase price. The purchaser was ignorant of the death of the maker of the power of attorney. Was the sale good?

COMMERCIAL LAW

Lesson 9

REAL PROPERTY—ESTATES


ESTATES
1. Quantity or duration of interest.
1. Freeholds.
1. Estates of inheritance—Fee simple absolute.
2. Estates not of inheritance—Life estates; [such as dower].
2. Less than freeholds—Leaseholds, for example.
2. Number of owners.
1. Estates in severalty—Single owner.
2. Estates in joint tenancy.
3. Estates in common.
3. Time of enjoyment.
1. Present
2. Future
1. Reversions.
2. Remainders.

Real Property Defined

1. Real Property is the right or interest that one may have in things real, i.e., immoveable (see Lesson 6, Sec. 3). The term "Estate" means the degree, quantity, nature and extent of interest which a person has in real property. Under the feudal system, which was introduced into England by the Normans, the King was deemed to be the owner of all the land, and all land was held directly or indirectly from the Crown—that is, the King divided the land among his nobles and they, in turn, gave to their vassals smaller holdings known as fees, fiefs, or feuds. While the feudal system has ceased to exist, we still cling to the feudal classification of estates and retain many rules and theories respecting them that had their rise in the ancient feudal policy.

Estates in Real Property

2. Estates in real property may be treated with respect to (1) the quantity or duration of interest, (2) the number of owners, (3) the time of enjoyment.

As to the quantity or duration of interest, estates are either freeholds or less than freeholds, the latter comprising chattel interests in lands such as leaseholds. Freeholds are divided into estates of inheritance and those not of inheritance. An Estate of Inheritance is one which, upon the death of the owner, passes by descent to his next of kin, or by will to his devisees. First among such estates is the fee simple absolute.

Estate in Fee Simple

3. An Estate in Fee Simple is the highest estate known in law and is defined as an estate of inheritance and of indefinite duration. The owner of an estate in fee simple is for all practical purposes an absolute proprietor. He may make any lawful use of the land. He may dig it up to search for minerals, may cut down trees, may erect or destroy buildings, or may ruin or improve the land as he sees fit. He may dispose of it by deed during his lifetime, or by will to take effect at his death.

Life Estates

4. Estates not of inheritance comprise all freeholds known as Life Estates. These may be created by agreement or by operation of law. Among the former is the estate held for the owner's own life and the estate held for the life of another. Among the latter is dower. This is a life estate which a wife has by law in lands held or acquired by her husband during their marriage and in which she has not barred her right to dower. It is not available until after the husband's death and amounts to a one-third life interest. Dower is allowed in Ontario, Nova Scotia, New Brunswick, and Prince Edward Island. In each of these provinces, the widow has the option of taking one-third of the income of the whole of the realty for life, or of having one-third of the realty set aside for her separate use for life. Dower is not allowed in Manitoba, Saskatchewan, Alberta, British Columbia, and the Yukon and North-West Territories. In Newfoundland dower is allowed in real property the husband has not disposed of during his lifetime or by will at death. If the husband gives a written agreement not to bar his wife's dower, that agreement is enforceable. (See Sec. 26, relative to Quebec.)

Life Tenant

5. One who holds a life estate is known as a Life Tenant. (The word tenant means one who holds and, while in popular use it is restricted to one who holds from a landlord, it is used here in the broader sense.) The life tenant may make any use of the land consistent with its being handed over to his successor in the condition in which he got it. He must not commit waste. He cannot claim compensation for permanent

improvements and is bound to keep the premises in ordinary repair. He cannot sell nor mortgage anything more than his life interest, nor can he make any disposition of it at his death. If he gave a lease, the death of the life tenant would terminate the tenancy. If he gave a mortgage, the encumbrance ends at his death. Upon his death his administrator may claim emblements, that is, the product of crops sown by the life tenant.

Estate in Severalty

6. Estates are classified as estates in severalty, in joint tenancy, and tenancy in common—according to the number and relationship of the owners. Where there is but a single owner who holds to the exclusion of all others, there is an Estate in Severalty. This is the most common and usual way of holding property.

Joint Tenancy

7. A Joint Tenancy exists where several persons have one and the same interest, acquired at one and the same time, by one and the same instrument, held by one and the same possession. The distinguishing feature of a joint tenancy is the right of survivorship. Upon the death of one joint tenant, his share goes to the survivor or survivors, and so on until there is but one tenant and he will then hold in severalty. A joint tenant has, therefore, no interest that he can dispose of by will, but he may mortgage or convey his interest. If he does this, the joint tenancy is destroyed and we have a tenancy in common. Any joint tenancy may be severed by operation of law. An assignment for the benefit of creditors operates as a severance of the joint tenancy, and each of the parties to the joint deed becomes owner of an undivided half interest in the severed property and the one-half interest of the debtor vests in the trustee. This assumes there are only two joint tenants. If there were three, each would become the owner of an undivided third interest.

Tenancy in Common

8. A Tenancy in Common exists where two or more persons hold possession of property at the same time by several and distinct titles. There is no survivorship between or among tenants in common. Thus, where a syndicate of persons combine to buy and hold a piece of land, they may have different shares in the venture and at the death of one his share may be disposed of by will.

Present and Future Estates

9. As to time of enjoyment, estates are either present or future. A Present Estate or an Estate in Possession is one to which the true owner is immediately entitled, or which he now has. Future Estates

or Estates in Expectancy are those the possession of which is withheld until some future time. They include reversions and remainders.

Reversions

10. A Reversion is that future interest which an owner has after conveying a present estate to another. Thus if A holds property in fee simple he may grant B a life estate in the property. This means that B has full use of the property during his life, but on B's death the estate reverts to A. When the property comes back to A there is a reversion. In other words, it comes back to the party who gave it.

Remainders

11. A Remainder is a future estate which is preceded and supported by a particular estate in possession. It takes effect in possession immediately upon the termination of the prior particular estate and it is created at the same time and by the same instrument that creates the particular estate. Thus: A has a fee simple estate in land. He dies, leaving a will by which he devises to his widow a life estate in the land (a particular estate or part of the entire estate) and the remainder in fee to his sons, C and D. The estate of the sons is a remainder. Remainders are either vested or contingent. In the above example, the remainder is Vested because the title has been passed to the remainder-men. If the remainder had been given "to those of my sons who survive their mother", it would have been Contingent. It could not be known until the death of the mother just who would survive, and the title would not pass until her death made it possible to know this.

REAL PROPERTY—TITLE

Title Defined

12. The term "Title" is used to indicate property or right of ownership, the sources of such right, or the means or method whereby one acquires an estate. In the latter sense, title is divided into two classes: (1) title by descent and (2) title by purchase. Persons who inherit estates take by Descent. Estates acquired in any other way are taken by Purchase.

Agreement for Sale

13. The most common way of obtaining purchase title is by a bargain and sale transaction. If the sale cannot be executed at once, an agreement to sell is drawn up and signed by the parties. A verbal agreement, even if something were paid as earnest money, would not

bind the parties. The Statute of Frauds provides that agreements touching lands must be in writing, and signed by the party to be charged, etc. If nothing were done but to pay something down to bind the bargain, the one who paid could forfeit the money and repudiate his agreement, or the one who received the money could return it and repudiate his agreement. A receipt given for such payment might be so explicitly worded as to what it was given for that it would bind the one who gave it, but not the other party. If the purchaser had legally entered into possession and had also paid something on the purchase price, the transfer would be valid.

The following is a form of an

AGREEMENT FOR SALE

MEMORANDUM OF AGREEMENT made and entered into this 1st day of June, in the year of our Lord one thousand nine hundred and forty-six.

BETWEEN James Gray, of the Town of Simcoe, in the County of Norfolk, Province of Ontario, vendor, of the first part;

AND William Franklin, of the Township of Woodhouse, purchaser, of the second part.

The said James Gray and William Franklin do hereby, respectively, for themselves, their respective heirs, executors and administrators agree each with the other, THAT the said James Gray shall sell to the said William Franklin, and that the said William Franklin shall purchase all that certain parcel or tract of land, being composed of Lot No. 10 in the Fifth Concession of the Township of Woodhouse, aforesaid, containing by admeasurement fifty acres, more or less, together with the appurtenance and the freehold and inheritance thereof in Fee Simple in possession free from all encumbrances, at or for the price or sum of one thousand dollars of lawful money of Canada, being the residue of said purchase money, on the 20th day of September next, at which time the purchase is to be completed, and the said William Franklin shall, on and from that day, have actual possession of said premises, all outgoings up to that time being discharged by the said James Gray.

That the production and inspection of any deeds or other documents not in the possession of the said James Gray, and the procuring and making of all certificates, attested office or other copies of or extracts from any deeds, wills or other documents, and of all declarations or other evidences whatever, not in his possession, which may be required, shall be at the expense of the said William Franklin.

That on payment of the said sum of $1,000.00 at the time specified for the payment thereof, as aforesaid, the said James Gray and all other necessary parties shall execute a proper conveyance of the said premises, with their appurtenances and the freehold and inheritance thereof in Fee Simple in possession free from all dower or other encumbrances, unto the said William Franklin, his heirs and assigns, or as he or they shall direct.

That if from any cause whatever the said purchase should not be completed on the said 20th day of September next, the said William Franklin shall pay interest at the rate of five per cent on the residue of the purchase money from that date till the completion of the purchase.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and the year first above mentioned.

JAMES GRAY.
WILLIAM FRANKLIN.

Signed in the presence of
HARRY POTTS

Option to Purchase

14. An option to purchase is quite different from an agreement of purchase and sale. An option is a contract which gives the party securing the option the right at some future date to purchase the land according to the terms set out in the contract that gives the option. In other words, it is an offer (which for a consideration is held open) to sell property which offer must be accepted by the date stated in the contract if the acceptance would bind the other party.

If the party to whom the option was given exercises his right, the contract is converted immediately into an agreement for sale. For this reason it is very important that all the conditions relating to possible sale be inserted in the contract giving the option.

It is important that the contract giving the option should state not only the date by which the offer must be accepted but it should state also the method by which the acceptance is to be communicated to the other party.

If the offer is not accepted by the date stated the option ceases to be effective, unless fraud on the part of the vendor prevented the party holding the option from complying with its terms.

The option must be supported by a consideration which may be the payment of a small amount, otherwise it will not be effective and the party holding it, if it is assignable, could not convey any rights under it. If the option is not exercised, the consideration given for it cannot be recovered as it was given expressly to have the offer held open.

Searching a Title

15. The Agreement of Sale binds the parties to a proposed actual sale and purchase should the investigation of the title produce no objections that cannot be overcome. The purchaser will naturally proceed to search the title. It will be appropriate to look at the plans in vogue for recording facts concerning land.

Registry Offices

16. We find Registry Offices opened under a plan similar to that introduced by William the Conqueror when he devised the Domesday

Book. Each of these Offices contains the records for a definite section of a province—a county, for example. In the books of the Registry Office, records are kept of all documents touching any parcel of land in the district covered by that Office. To find one's way through these records and to arrange all the facts relating to any parcel of land is not an easy task for a layman.

The Torrens System

17. To simplify matters is the object of the Torrens System which we get from Australia. It is in force in Manitoba, Alberta, Saskatchewan, and North-West Territories. In Ontario, also, there is the Land Titles Act which enables owners of land, if they choose, to have their titles brought under the Torrens System.

Land Titles' Office

18. Suppose it is desired to bring certain lands under the Land Titles Act, the application (with documents) is left at the Land Titles' Office. The title will be fully investigated and, if found to be secure against all claims, the application will be entered in the register and a Certificate of Title issued on request. If the land is sold, the certificate held by the owner is returned to the Office because it must be handed to the new owner with the transfer endorsed on it. This process is repeated with every sale. It will thus be seen that every person entitled to a freehold registered in the office of Land Titles has but one document to show his title, no matter through how many hands the property has passed.

Certificate of Title

19. If the owner wishes to mortgage, lease or in any way encumber his land, the record is made on the Certificate of Title and entered in the register in the Office. Searching a title under such a system is not a difficult task, for the Certificate of Title tells its own story at any time.

Deed of Conveyance

20. Coming back to the matter of our sale, and supposing that the search of the title has satisfied the prospective purchaser, it will be in order to consider the Deed of Conveyance. The older form of this document, known as the Warranty Deed with Full Covenants, is today replaced by what is known as the Warranty Deed with Abbreviated Covenants, or the Statutory Deed. The latter simply represents the former in a much more concise form. This is the document which grants to the purchaser, in fee simple, the lands and premises which are noted in the Deed. After being duly drawn up it is signed by the grantor, and in certain cases by both parties. The document is next

sealed and then delivered into the hands of the purchaser. The purchaser is not obliged to register his deed but, for his own protection, he ought to see that the document is registered and, for this purpose, it is necessary that it should be witnessed and the witness should make an affidavit as to the execution of the deed. Thus, after registration, it is made clear either in the Registry Office or the Land Titles' Office who is, in reality, the owner of the lands.

Registration or failure to register does not affect the validity of a document of title as between the parties thereto—but a purchaser, mortgagee, or person taking any interest in land who fails to register the document through which he takes title runs the risk of having some third person dealing directly with the registered owner obtain priority to him providing the purchaser or mortgagee has no notice of the unregistered claim and registers his documents of title first. In other words, registration is only notice to persons dealing with the property, and such persons are entitled to assume that the registered documents show all claims against the property.

STATUTORY DEED

THIS INDENTURE, made in duplicate the first day of April, in the year of our Lord, 1946, in pursuance of the Short Forms of Conveyances Act:

BETWEEN—

Edward T. Hemming, of the Township of Barton, County of Wentworth, and Province of Ontario, Merchant,
of the first part,

and

Ada Hemming, wife of the party of the first part,
of the second part,

and

Walter Jones, of the Township of East Flamboro, County of Wentworth, and Province aforesaid, Yeoman,
of the third part.

WITNESSETH, that in consideration of Two Thousand Dollars ($2,000.00) lawful money of Canada now paid by the said party of the third part to the said party of the first part, the receipt whereof is hereby acknowledged, he, the said party of the first part, doth grant unto the said party of the third part, in fee simple,

ALL AND SINGULAR that certain parcel or tract of land and premises, situate lying and being in the Township of Barton, County of Wentworth, and Province of Ontario, containing by admeasurement one hundred acres, be the same more or less, being composed of the south half of Lot No. 49 in the 9th Concession of the Township of Barton aforesaid;

TO HAVE AND TO HOLD unto the said party of the third part his heirs and assigns, to and for his and their sole and only use forever subject, nevertheless,

to the reservations, limitations, provisos and conditions expressed in the original grant made thereof from the Crown.

The said party of the first part covenants with the said party of the third part, that he has the right to convey the said lands to the said party of the third part, notwithstanding any act of the said party of the first part.

And that the said party of the third part shall have quiet possession of the said lands, free from all encumbrances.

And the said party of the first part covenants with the said party of the third part, that he will execute such further assurances of the said land as may be requisite.

And the said party of the first part covenants with the said party of the third part, that he has done no act to encumber the said lands.

And the said party of the first part releases to the said party of the third part, all his claims upon the said lands.

AND Ada Hemming, the party of the second part, hereby bars her dower in the said lands.

IN WITNESS WHEREOF the said parties have hereunto set their hands and seals.

E. T. HEMMING. [SEAL]
ADA HEMMING. [SEAL]

Signed, sealed and delivered
in the presence of
CHARLES BLACK.

AFFIDAVIT

COUNTY OF WENTWORTH } I, Charles Black, of the Township of Barton,
TO WIT: } Gentleman, make oath and say:

1. That I was personally present and did see the within instrument and duplicate thereof duly signed, sealed and executed by Edward T. Hemming and Ada Hemming, two of the parties thereto.

2. That I know the said parties.

3. That I am a subscribing witness thereto.

CHARLES BLACK.

Sworn before me in Barton,
this first day of April, 1946.
JOHN WILLIAMS,
A Commissioner, etc.

Caveats or Caution Under Land Titles Act

21. It happens sometimes that a person holds a contract from the owner of land such, for example, as a contract under which the owner undertakes to cut and deliver, or to sell without cutting, a certain amount of timber. The contract may relate to other things of course. It will be apparent that the person who is not the owner of the land has an interest that would be prejudiced if the owner should sell his property before completing the contract. This will be true

particularly, as is very often the case, if the other party had advanced the owner a sum of money before the work of the contract was carried out.

In order that his interests may be protected, he (the other party) would have the right to register with the Master of Titles a caveat or caution. The purpose of the caveat or caution is to forbid any dealing with the land by the owner in whose name it is registered without notice being given to the party who has registered the document. Before the caution is registered, it must be verified by an affidavit in the form prescribed for the purpose, and the caution must give the address to which notice may be sent in case any transfer is about to be undertaken. The notice to the party registering the caution may be made on him personally or by registered letter.

An agent who claims a commission on the sale of land cannot file a caution against the land.

The person in whose name the land is registered may take steps to have the caution removed. In such a case, the cautioner must show good reason for its continuance. The cautioner may, by notice to the Master of Titles, withdraw his caution at any time, or he may give his consent to allow certain registered dealings that do not interfere with his interest.

Fixtures

22. In a sale of real estate including buildings, the fixtures attached to the buildings go with the property unless specifically excluded.

Quit Claim Deed

23. In addition to the Warranty Deed and Statutory Deed, we have the following: The Quit Deed is used where one has not a perfect title but wishes to transfer such claim as he has. It is very much like the Warranty Deed without the covenants. A Trust Deed is made to a person called a trustee, conveying property to him to be held in trust for another.

Deed of Gift

24. A Deed of Gift is one in which the consideration is natural love and affection or good consideration. This, as between near relatives, is quite valid, unless it is proved that the transfer was made for the purpose of defrauding legitimate creditors of the one transferring.

Tax Sale Title

25. All provinces allow the sale of land for taxes when the taxes have been in arrears beyond a specified period. (In Ontario the period

is three years.) A title thus obtained through a tax sale extinguishes all other titles if proceedings are in accord with the statutes of the province.

PROPERTY—MARRIED PERSONS—QUEBEC, NOVA SCOTIA

26. In Quebec, married women may be either separate as to property or in community of property with their husbands. There will be community of property between husband and wife whose residence is in Quebec in all cases where there is no contract to the contrary entered into before marriage. As this is fixed by law, it is called Legal Community. If a contract does not state what the community shall include, each one retains his or her rights over the immoveable property, that is, real property, owned by each at the time of marriage. All personal property (moveables or chattels) that they owned at time of marriage, and what comes to them afterwards by gift or by succession (passing down from estates of deceased persons), and all real property acquired after marriage otherwise than by succession or gift, enter into the community of property. If there is a marriage covenant it must be made before marriage, and if it is intended to modify legal community it must be in notarial form.

If property is received by either party through succession or gift, the donor or testator may make specific direction. If such direction is not made, moveables (personal property) are deemed to be in community, and real property separate.

During the existence of the community of property, the husband has exclusive powers of administration and disposition of the property while he lives. He may sell or pledge it without concurrence of his wife except when property is subject to dower. He cannot dispose of her real estate without her consent nor lease it for a term beyond nine years, and can will only one-half of the community property as death dissolves the community. Each party is entitled to one-half of the common fund when the community is dissolved.

Community of property is dissolved by death or divorce; by a judgment of separation; by a judicial separation of property when the wife's interests are imperilled; or by absence of one of the parties for thirty years.

If a wife is separated from her husband or is separate as to property only, she regains full power of administration of her moveable property. If she is separate only as to property, she cannot dispose of her real property without the consent of her husband or, if he refuses, then by

authority of the Court. If she is separated entirely both as to living and property, Court authority would be necessary if she would dispose of her real property.

As pointed out earlier, a contract before marriage may provide that the parties are separate as to property. In that case the wife administers her own property, both personal and real, but if she would dispose of her real property she requires the authorization of her husband or, if he refuses, she requires an order of a judge.

Except in Nova Scotia and Quebec, a married woman may engage in trade in her own name and render her separate property only liable under her contracts. She is also subject to laws relating to insolvency. Should she engage her husband to assist her—on a salary or otherwise—he is in the position of a clerk. If a cheque to cover an account is received on behalf of the business but is made payable to the husband, the account is not paid if the husband should cash the cheque and keep the money.

In Nova Scotia, a married woman may engage in trade in her own name but either she or her husband must file in the Registry Office a certificate giving their names and the nature and place of business. If this is not done, her separate property would be liable for her husband's debts and his property would be liable for her debts in connection with the business.

In Quebec, if a married woman would become a public trader she must have the authorization of her husband, express or implied. After she receives her husband's authorization, she may obligate herself for all that relates to her business. If she is not separate as to property, that is, if there is community of property, the husband would be liable for her debts and, of course, her own property and goods would be liable for her business debts. If they are separate as to property, she can enter into contracts relating to her business and her separate estate only would be liable for her business debts. Before commencing business, however, she must register, when separate as to property, or she will be liable to a heavy penalty. A husband and wife cannot enter into partnership with each other; neither may they together enter into a partnership with a third party.

RIGHTS OF WAY

27. It happens very often that a person will have a right of way over the land of another. This right should be expressed in a deed conveying the right of way but not conveying the title to the property. Such a deed should be registered so that any prospective purchasers of

the land may have access to the information that the right of way has been granted.

A very common example of rights of way is found in the case of mutual driveways between two houses. Usually this means that each of the parties owns a part of the land used as a driveway and each will convey to the other the right to use as a driveway that part of the land which he owns. As pointed out, the title to the land itself is not conveyed, but only its use. When each conveys this right to the other, both have the privilege of using the driveway. Neither may obstruct it to prevent free use by the other.

If the right of way is given at the time of the conveyance of the properties of which the rights of way form parts, special reference should be made in the deeds to give assurance that the parties are entitled to pass over that portion of the land belonging to the other.

WATER AND WATERCOURSES

28. A person whose land is in actual contact with water is known as a riparian owner if the watercourse is a natural one and the water flows in a definite channel whether it is on the surface of the land or below it. He has a proprietary right to have the water flow in its natural state as to quantity and quality. This is true whether he has made use of it or not, but he is entitled to make certain use of it while it is on his land.

A riparian owner may take any quantity of water for ordinary purposes and even for purposes beyond ordinary provided that he does not interfere with the rights of other riparian owners. The rights of others will govern the amount that he may use for irrigation or other special purposes such as for manufacturing.

Water may be diverted by a riparian owner as long as he returns it opposite his own land without diminishing the volume or injuring its character. He cannot divert it altogether, however, as to do so would give other owners the right to apply for injunctions to restrain him. In case a stream runs through the property of a number of owners, one on the upper part of the stream would not have the right to enlarge the channel in a way that might injure an owner on a lower part of the stream.

An owner would have the right to use waterpower from flowing water and to build dams, etc., as long as he does not interfere with the rights of other owners. He would not have the right, for instance, to raise the level of the water that flows past the land of other owners, nor to cause the water to back up on the lands of owners above him,

and the water must be allowed to pass on to the owners below. He would not have the right to obstruct the passage of fish up or down a stream.

From the above it will be quite clear that riparian owners may make considerable use of water flowing through their lands, but in every case it must be done without injury to other similar owners.

REAL PROPERTY—REAL ESTATE MORTGAGES

Mortgage Defined

29. Under the Registry Office System, a Mortgage is in reality a Deed of Conveyance with a proviso. In other words, if a mortgage and a deed are placed side by side, some striking similarities will be found in the general reading of the documents. It will be noted, however, that the mortgage contains a clause, not found in the deed, by which it is provided that the mortgage is to be void upon the repayment of the mortgage money and interest. Under the Torrens System, the mortgage is not a conveyance of the land but a Registered Charge upon the land for the payment of the money.

Mortgage Claims

30. Ordinarily speaking, the mortgage gives two claims—one against the property and the other against the mortgagor. In other words there will be found, in addition to the words indicating the conveyance of the property as a security for the debt, what is called a Personal Covenant, by which the mortgagor undertakes to pay the mortgage money and interest. Of course, this personal covenant (which is usually found in the printed forms of mortgage) may be struck out by mutual consent, in which case there remains only the claim against the property.

Form of Mortgage

31. Mortgages, like deeds, should be properly signed, sealed, delivered and registered. It is important to note that there may be more than one mortgage on the same property and that, while a mortgage is binding on the property as soon as it is executed, it is the mortgage which is first registered that has first claim against the property—unless the mortgagee who first registered his mortgage had actual notice that a prior mortgage existed. Where lands are held under the Torrens System, mortgages must be registered in order to be valid. In Ontario, the mortgagee would hold the Certificate of Title until the mortgage is paid. The mortgagee may procure a Certificate of Charge showing his relation as the virtual owner of the property.

MORTGAGE

THIS INDENTURE made in duplicate the first day of July, one thousand nine hundred and fifty, in pursuance of the Short Forms of Mortgages Act.

BETWEEN Mary Wilson, of the village of Ayr, in the county of Waterloo, wife of Robert Wilson, and Robert Wilson, of the said village of Ayr, yeoman, hereinafter called the mortgagors, of the first part, and John Smith, of the city of Brantford, in the county of Brant, merchant, hereinafter called the mortgagee, of the second part.

WITNESSETH that in consideration of one thousand dollars of lawful money of Canada, now paid by the said mortgagee, to the said mortgagors (the receipt whereof is hereby acknowledged), the said mortgagors do grant and mortgage unto the said mortgagee, his heirs and assigns forever:

ALL AND SINGULAR that certain parcel or tract of land and premises situate, lying and being in the township of North Dumfries, in the county of Waterloo, province of Ontario, being the south half of lot number thirty-two, in the fourth concession of the township of North Dumfries aforesaid, containing by admeasurement One Hundred Acres, be the same more or less.

PROVIDED this mortgage to be void on payment of one thousand dollars of lawful money of Canada, with interest at seven per cent per annum, as follows: The said principal sum of one thousand dollars to be due and payable in three years from the date hereof with interest thereon from the said date at seven per cent per annum, as aforesaid, payable yearly, and taxes and performance of statute labour.

The said Mortgagors covenant with the said mortgagee, that the mortgagors will pay the mortgage money and interest, and observe the above proviso.

That the mortgagors have a good title in fee simple to the said lands; and that on default the mortgagee shall have quiet possession of the said lands free from all encumbrances; and that the mortgagors will execute such further assurances of the said lands as may be requisite; and that the said mortgagors have done no act to encumber the said lands and that the mortgagors will insure the buildings on the said lands to the amount of not less than nine hundred dollars currency; and the said mortgagors do release to the said mortgagee all claims upon the said lands, subject to the said proviso.

PROVIDED that the said mortgagee on default of payment for three months, may, upon giving one month's notice, enter on and lease or sell the said lands; provided that the mortgagee may distrain for arrears of interest; provided that in default of payment of the interest hereby secured, the principal hereby secured shall become payable; provided that until default of payment the mortgagors shall have quiet possession of the said lands.

IN WITNESS WHEREOF the said parties hereto have hereunto set their hands and seals.

MARY WILSON. [SEAL]
ROBERT WILSON. [SEAL]

Signed, Sealed and Delivered
in the presence of
HENRY JONES.

(To be followed by affidavit of witness as in case of Deed.)

Payment of Mortgage

32. When a mortgage falls due it may be paid without any notice to the mortgagee, unless it is specified to the contrary in the mortgage. If default is made in the payment of the principal money, the Ontario statute provides that the mortgagor has two courses open to him. He can redeem the amount of the mortgage upon payment of the principal in arrears with interest to date plus three months' advance interest as a bonus. As an alternative, instead of making his payment at once, the mortgagor may give the mortgagee three months' notice of his intention to make such payment at the expiration of the time named. If he makes such payment on such date, together with interest due up to such date, he need pay no further interest. It will be observed that the mortgagee is protected if he wishes to reinvest the money either through the payment to him of three months' interest after the principal was paid (as in the first case) or by the three months' notice that the payment is going to be made (as in the second case). Custom, rather than statute, seems to have established the same general principle in other provinces—with a change to six months in the terms of notice. Of course, if the mortgagee demands payment, then the mortgagor may pay at once.

Prepayment of Mortgage

33. Generally speaking, the mortgagee cannot be compelled to accept prepayment. It is provided, however, by a Dominion Statute that where the mortgage is for a period of more than five years the mortgagor (at the expiration of five years) may tender the amount due for principal and interest, together with three months' further interest in lieu of notice. If this is not accepted, no further interest shall be chargeable. This provision as to prepayment does not apply to mortgages given by corporations.

Proceedings Upon Non-payment

34. If the mortgage is not paid at maturity the mortgagee has several remedies, and these will be best understood if we refer to the fact of the two claims which the mortgage generally gives.

(*a*) He may allow the mortgage to run on and draw interest; or

(*b*) He may bring action to obtain payment for principal and interest due; or

(*c*) He may bring an action of ejectment and obtain possession of the land by order of the Court and then collect the rents and profits until the full mortgage debt and interest are paid; or

(*d*) He may bring suit to have the mortgage foreclosed, in which

event all equities of redemption are barred and he becomes the absolute owner; or

(*e*) He may sell the lands in accordance with the terms of the "power of sale" clause contained in most mortgages. Where the mortgage does not contain a power of sale, Section 18 of The Ontario Mortgages Act gives the mortgagor power to sell at auction or private sale after the expiration of four months from the time when the principal money became payable or after any interest on the principal money has been in arrears for six months.

(*f*) He may bring an action on the Covenant and reach other property of the mortgagor by way of execution.

Mortgagee Taking Possession

35. In connection with (*c*) as above, it will be understood that the mortgagee who simply takes possession without foreclosure is not in reality the absolute owner but simply a trustee. The mortgagor may at any time within ten years redeem his property. In the meantime, the mortgagee will be held to strict account for all his dealings in connection with the property.

Foreclosure

36. In connection with (*d*) as above, we note that the idea of foreclosure is to allow the mortgagee to take possession and establish him as the absolute owner without leaving in the hands of the mortgagor any power to redeem. Foreclosure is simply the legal process of taking away this power to redeem, which is known as the mortgagor's "Equity of Redemption", and also of barring claims of holders of subsequent mortgages or other interests in the lands.

Six months are allowed to the mortgagor and holders of later mortgages in which to redeem—by payment of mortgage money, interest and costs. In addition, the mortgagor or a subsequent mortgagee may take action to force a sale instead of allowing the first mortgagee to foreclose. This will be done by the mortgagor or subsequent mortgagee filing a request for sale based on the reason that the property, if sold, would produce more than the mortgage debt. This request will be filed in the office from which the writ of foreclosure was issued, and the party making the request must deposit $80.00 to cover the cost of such sale.

Mortgagee Selling Property

37. In connection with (*e*) as above, we find that practically every mortgage contains a "Power of Sale" clause similar to the one in the form of mortgage shown. The sale process cuts off the mortgagor's

Equity of Redemption as effectually as foreclosure. In a judicial sale, i.e., a sale by order of the Court, a mortgagee may obtain the leave of the Court to bid. But a mortgagee may not, under the Power of Sale clause in a mortgage, sell to himself either alone or with others; nor may he sell to a trustee for himself. If the personal covenant stands in the mortgage and the sale does not bring enough to pay the mortgage money, interest and costs, the mortgagor is still liable for the balance. The mortgagee could enter action against him personally, secure judgment and, if necessary, an execution might issue which would bind other property of the mortgagor.

The mortgagor may pay the amount within the time of the notice and prevent a sale. If payment is tendered but the property is nevertheless sold after such tender, the sale will be set aside if the purchaser had notice of the tender.

If the holder of a second mortgage sells under the Power of Sale clause in his mortgage and does not redeem the first mortgage, the purchaser buys subject to the first mortgage.

Interest on Mortgage

38. In the matter of interest, it will be understood that the mortgagor must pay the rate that he covenants to pay. If there is no interest clause in the mortgage, interest is implied and the legal rate of five per cent will govern.

The following sections from our Canadian Interest Act are submitted—

"Whenever any principal money or interest secured by mortgage of real estate is, by the same, made payable on the sinking fund plan, or on any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever shall be chargeable, payable or recoverable, on any part of the principal money advanced, unless the mortgage contains a statement showing the amount of such principal money and the rate of interest chargeable thereon, calculated yearly or half-yearly, not in advance."

"Whenever the rate of interest shown in such statement is less than the rate of interest which would be chargeable by virtue of any other provision, calculation or stipulation in the mortgage, no greater rate of interest shall be chargeable, payable or recoverable, on the principal money advanced, than the rate shown in such statement."

"No fine or penalty or rate of interest shall be stipulated for, taken, reserved or exacted on any arrears of principal or interest secured by mortgage of real estate, which has the effect of increasing the charge on any such arrears beyond the rate of interest payable on principal money not in arrears; PROVIDED that, nothing in this section contained shall have the effect of prohibiting a contract for the payment of interest on arrears of interest or principal at any rate not greater than the rate payable on principal money not in arrear."

If interest is not paid, the mortgagee has power to take possession, or foreclose, or sell, or he may sue for any arrears of interest. If there are any goods of the mortgagor on the premises, he may distrain for arrears of interest; PROVIDED there is a clause in the mortgage giving him the right to do so. Goods of a tenant, or goods exempt by statute from seizure by execution cannot be seized.

Assignment of Mortgage

39. A mortgage may be transferred but, as it is not a negotiable instrument, it must be transferred by means of assignment and the assignment, which is a document under seal, should be registered where the mortgage is registered, if the assignee of the mortgage is desirous of protecting his interests as owner of the mortgage.

The registration of the assignment by the assignee is notice to the public in general that the mortgage has been assigned, but direct notice—preferably in writing and by registered mail—should be given to the mortgagor so that he may know to whom he should make his payments. If that notice is not given and he pays the former mortgagee who wrongfully takes the money, the assignee cannot make the mortgagor pay again. In order to recover the amount so paid, the assignee must take action against the former mortgagee.

Discharge of Mortgage

40. When a mortgage is duly paid at maturity, the mortgagee is required to give the mortgagor a discharge, which is simply a statutory form of receipt. The discharge will be given at the expense of the mortgagor and he should see that the discharge is registered where the mortgage is registered. This registration of the discharge has the effect of reconveying to the mortgagor his original estate in the property.

REAL PROPERTY—LANDLORD AND TENANT

Terms Defined

41. A landlord is one who owns houses or lands and who, for the time being, gives the use of such houses or lands to another.

A tenant is a person who secures from the landlord the use of such houses or lands.

Rent is the consideration that the tenant or lessee pays to the landlord or lessor for the use of such houses or lands.

A lease is a contract between landlord and tenant.

Form of Lease

42. A lease not exceeding three years is valid even though only verbal. The Statute of Frauds requires that all leases of more than three years shall be in writing and under seal. This is subject to one exception, namely: that if the tenant has entered into possession and paid rent, his lease will be upheld by the Courts even though it does not comply with the Statute of Frauds. In Ontario, if the lease is for a period exceeding seven years, it should also be registered. In Quebec, leases for over one year must be under seal and registered in order to be valid against a subsequent purchaser. In all the other provinces and in the territories, a lease exceeding three years is required to be registered as well as under seal if it would be valid against subsequent purchasers and mortgagees for value.

LEASE

IT IS HEREBY AGREED between George Foster, party of the first part, and H. B. Wells & Co., parties of the second part, as follows: The said party of the first part, in consideration of the rents and covenants herein specified, does hereby let and lease to the said parties of the second part, the following described premises, situated and being in the City of Toronto, County of York and Province of Ontario, to wit: A Store at 527 King Street, for the term of one year from and after the first day of May, 1947, on the terms and conditions hereinafter mentioned, to be occupied for a General Merchandise Business.

PROVIDED, that in case any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the said party of the first part, his certain attorney, heirs, representatives, and assigns to re-enter into, re-possess the said premises, and the said parties of the second part, and each and every other occupant, to move and put out.

AND the said parties of the second part do hereby hire the said premises for the term of one year as above mentioned, and do covenant and promise to pay to the said party of the first part, his representatives and assigns, for rent of said premises for said term the sum of Twelve Hundred Dollars ($1,200.00), to be paid as follows:

ONE HUNDRED DOLLARS in advance on the first day of May and One Hundred Dollars on the first day of each succeeding month for one year.

SAID PARTIES of the second part further covenant that they will not assign nor transfer this lease, or sublet said premises, or any part thereof, without the written assent of the said party of the first part.

AND ALSO, that said parties of the second part will, at their own expense, during the continuance of this lease, keep the said premises, and every part thereof in as good repair, and at the expiration of the term, yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damage by the elements excepted.

AND the said party of the first part does covenant that the said parties of the second part, on paying the aforesaid instalments and performing all the covenants aforesaid, shall and may peacefully and quietly have, hold and enjoy the said demised premises for the term aforesaid.

THE COVENANTS, conditions and agreements, made and entered into by the several parties hereto, are declared binding on their respective heirs, representatives and assigns.

WITNESS our hands and seals this first day of May, 1947.

H. B. WELLS & CO. [SEAL]
GEORGE FOSTER. [SEAL]

Signed, Sealed and Delivered
in the presence of
M. R. BROWN.
GEO. C. TAFT.

Different Tenancies

43. A lease may be for a term certain as where one gets the use of lands or houses for a week, a month, a quarter, or a year. A lease may also be for a term uncertain as where one leases by the week, month, quarter, or year. In the latter case the tenant is referred to as a weekly tenant, a monthly tenant, a quarterly tenant, or a yearly tenant, as the case may be. There is also a tenancy at will as where one who has leased for a term certain, such as a month, remains in possession of the premises after his month. He is there at the will of the landlord, who may take measures to have him evicted at any time. There is also a tenancy for life, where one has the use of premises during the period of the life of either the landlord or the tenant.

Landlord's Covenants

44. The landlord contracts or covenants to give the tenant quiet enjoyment, that is, the tenant must not be molested by those who claim under or through the landlord.

Tenant's Covenants

45. The tenant contracts or covenants to pay rent and to deliver up the premises in as good condition as he received them—ordinary wear and tear excepted.

Notice to Quit

46. At the expiration of a term certain, the tenant is free to move out and the landlord is free to lease to another tenant. No notice is required. The expiry of the month or the year, as the case may be, simply marks the discharge of the contract.

Length of Notice

47. In the case of a term uncertain, notice is necessary. This notice may be arranged for in the lease and, if so, the time therein specified must govern. If no time is specified in the lease, then the length of

notice that must be given is determined by the Common Law or (in some of the Provinces) by Statute. As this is a very technical branch of the law and involves a good many considerations not likely to be taken into account by a layman, it is always advisable to consult a reliable lawyer when a question arises involving the length of notice which ought to be given (and the lease is silent on the point). Note should, however, be taken of the following, which will apply generally.

In all the provinces except Quebec, Nova Scotia, and New Brunswick a yearly lease requires six months' notice before the date of the expiration of the lease; a quarterly tenancy requires three months' notice; a monthly tenancy, one clear calendar month's notice; and a weekly tenancy one clear week's notice.

A tenancy at will does not require any notice by the landlord but merely a demand for possession.

A tenancy from year to year is merely a yearly tenancy and requires six months' notice to terminate it.

In Nova Scotia a yearly tenancy requires three months' notice to terminate it; a quarterly or monthly tenancy, one month's notice; and a weekly tenancy, one week's notice.

In New Brunswick a yearly or six months' tenancy requires three months' notice; a quarterly or monthly tenancy, one month's notice; a weekly tenancy, one week's notice.

In Quebec, where the term of a lease is not agreed upon, or where the lease is verbal or implied, and the rent is payable at periods of three months or more, i.e., quarterly, semi-annually, or yearly, three months' notice must be given to terminate it. If the rent is payable at so much a month, one month's notice is necessary; and if so much per week, a week's notice.

Date of Notice

48. This notice may be given by the landlord who wishes the tenant to move out, or by the tenant who wishes to vacate the premises. It cannot be given at any time, but must be given so that the term of notice expires with the anniversary date of the lease. Thus, a contract is made on 28th April, 1946, by which a tenant enters as a yearly tenant. If either party wishes to cancel this contract, it must be done by giving, in Ontario, for example, six clear calendar months' notice to expire on 28th April, 1947. This would mean that the notice must be given not later than 27th October, 1946. The tenant could not make up his mind after he had been in the premises for a month, let us say, to get out by giving six months' notice, nor could the landlord

dispossess him. Both are bound for one year at least. Such is the case in a yearly tenancy or, as it is generally expressed, "from year to year, so long as both shall please". If the contract had read "one year certain and so on from year to year", then both are bound for two years at least and a notice to terminate at the end of those two years would have to be actually put into the hands of the receiver not later than 27th October, 1947.

The expiry of time terminates the tenancy in a lease for a term certain, and "proper notice" terminates it in a lease for a term uncertain.

Surrender of Key

49. While the acceptance of the key by the landlord may appear to imply that he has accepted possession of the property, it is not conclusive evidence unless the key is accepted with the intention that the lease is to be terminated. The fact that the tenant has abandoned possession does not amount to a surrender and a termination of the tenancy unless the landlord has accepted it as such. Thus if the tenant gives up possession before the termination of his lease, the landlord has hardly any option but to accept the key—but that will not mean that he has surrendered his rights against the tenant. Should the landlord, however, relet the premises or sell the property, there would then be a real surrender through the act of the landlord. The reference is, of course, to a reletting of the property and the giving of possession before the previous tenant's period has expired. Even if possession has been abandoned and the key delivered before the lease has expired, the tenant is not relieved of his liability for rent to the end of the term of the lease or such period as would have been necessary to give valid notice.

Overholding Tenant

50. If the tenant remains in possession after he has received proper notice to quit or after he has given notice of his intention to vacate he is an overholding tenant, subject to eviction at any time without notice, and liable to pay for the use and occupation for the term of overholding. We do not call such payment rent, for there is no lease.

Tenancy by Implication

51. If the tenant offered and the landlord accepted rent as had been their custom before the lease expired, then a new tenancy might be created by implication. Thus if the tenancy was for one year with the rent payable on the first of each month, and at the expiry of the year the tenant offers and the landlord accepts the rent for what would be the first month of another year, then a yearly tenancy is

created and six months' notice would be required in Ontario to terminate it. The same idea can be worked out for leases for other terms. If the original lease was for several years, the tenancy by implication would be a yearly one just as when the original lease was for one year.

Eviction and Doubling Rent

52. The landlord need not thus commit himself to a new lease by implication by accepting rent after the tenancy has expired. Instead, he may evict the tenant by procedure under the Landlord and Tenant Act; or he may bring action of ejectment by ordinary writ of summons; or he may, after demand and notice in writing to deliver up the premises, double the rent for such time as the tenant remains in possession and may collect the amount by suit.

53. Under ordinary conditions the landlord has no more right to break his contract and ask for more rent than the tenant has to expect to pay less, but we have been considering a case where the contract between the two had been terminated by expiry of time or proper notice. From this we deduce the general principle that to increase the rent the landlord must first terminate the original contract.

This may be done by proper notice to quit, followed by the offer of a new lease at the increased rental. If the tenant remains in possession, he tacitly agrees to pay the higher rent. Bear in mind that if the tenant is leasing for a term certain as, for example, for one month, the landlord is spared the trouble of sending notice to quit because the expiry of the month ends the tenancy.

Distraining for Rent

54. Under certain conditions, the landlord has the right to distrain, i.e., to seize and sell the tenant's goods, for rent which is in arrears. If rent is payable in advance, it is in arrears if not paid when due.

Seizure must not be made before sunrise, nor after sunset, nor on a Sunday, nor on a legal holiday. It must, as a general rule, be made on the premises. If the tenant is removing goods fraudulently—for example, the day the rent is due, or during the night of the day the rent fell due—and the landlord forbids removal, he may seize them on the highway or follow them for thirty days and seize them, unless they are sold in the meantime to a bona fide purchaser. If rent is not due and the tenant is moving out, the goods cannot be seized.

In most provinces the right to distrain holds for six months, if the tenant is still in possession and the landlord retains his title. If he has sold the property he cannot distrain, but may recover by suit.

The landlord may act himself, or may give a bailiff the power to

act for him, by issuing a Distress Warrant or authority to the bailiff to seize the goods for him. When the goods are seized, an inventory is made of the articles taken, and a copy of this—together with a bill of charges, the cost of seizure, and a statement of the amount distrained for—is given to the tenant. If he fails to pay the amount due within five days, the goods may be appraised by two sworn appraisers and then sold, and the amount payable realized in this way. If the landlord has thus issued a distress he loses his right by abandoning it or withdrawing it, and cannot make a second seizure of the same goods for the same debt unless there was a mistake in the first seizure or the withdrawal was at the request of the tenant.

Goods Exempt from Seizure

55. In Ontario and Quebec certain of the goods and chattels of the tenant are exempt from seizure. The tenant also has the power of choice. Thus, if the law says that six chairs are exempt from seizure the tenant may pick out the six chairs, but he cannot claim his exemptions and resist the landlord at the same time. He must be ready and willing to give up the premises. He can then take his exemptions and move out, leaving the rest of his goods to be sold, or he may pay rent and costs and move out with all his goods. If he neither pays rent nor gives up possession after legal notice to vacate, the landlord may (after three days' further notice) seize and sell even the goods usually exempt. On a monthly tenancy, in Ontario, exemptions hold good only to the extent of two months' rent. If rent is in arrears for a longer period, the landlord can distrain and sell all the chattels on the premises—except exempt chattels to the value of two months' rent.

Landlord a Preferred Creditor

56. The landlord may find, when he comes to levy distress, that the goods have already been seized by the sheriff under a writ of execution, following legal process by some other creditor. In such case, the landlord has a preferred claim for one year's rent or less, and the goods cannot be sold or removed without this claim being provided for. Beyond one year's rent the landlord can only expect to share rateably with other creditors.

The landlord may find, when he comes to levy distress, that the tenants have gone into bankruptcy. In such a case the rights of the landlord are governed by the particular provincial law applicable, there being such provision in the Dominion Bankruptcy Act. If there are goods that would have been distrained, the landlord is entitled to a preferred claim (as provided in the provincial statute) for three months' rent immediately prior to the date of assignment or insolvency, and from thence so long as the trustee retains possession

of the premises. If there is an acceleration clause in the lease, the landlord will be entitled to a preference for a further three months' rent from the date of the tenant being declared a bankrupt whether the trustee retains possession or not. If the trustee retains possession, the amount allowed by him for the three months following bankruptcy would cover the accelerated rent.

Repairs

57. The clause in the lease illustrated concerning repairs is the usual one. It binds the tenant to make repairs—"reasonable wear and damage by the elements excepted". If no such clause is found in the contract, there is no implied contract on the part of either the landlord or the tenant to make repairs. This is the law in all provinces except Quebec. Through lack of repairs the premises might become unfit for use by the tenant and yet, if the landlord had not contracted to make repairs, he could not be compelled to do so—neither could the tenant make repairs and deduct the amount from the rent, nor could he move out before the term of the lease has expired and thus escape payment of rent. On the other hand, if the landlord contracted to make repairs and failed to do so, the tenant may bring action for breach of contract; or—after due notice of repairs needed and demand to have them made—he may make the repairs himself and sue the landlord for the amount, or deduct the amount from the rent.

In Quebec, it is implied that when a landlord leases premises they are fit for use by the tenant. The landlord is required to make all necessary repairs during the term of the lease unless the contract otherwise provides. The tenant is required to make good all damage caused by the tenant and to leave the premises in as good condition as he got them, ordinary wear and tear excepted.

Fixtures

58. The law regarding fixtures may be stated as follows—

> "The lessee may, on or prior to the expiration of the term, remove and carry away all fixtures, fittings, machinery, or other articles upon the premises, which are in the nature of trade or tenant's fixtures or which were brought upon the premises by the lessee, provided same can be removed without doing structural damage to the premises."

Thus, if the tenant hopes to retain his right to remove such fixtures, he must be careful not to affix them to the freehold so that they cannot be removed without serious damage, otherwise they become part of the freehold. If there is any doubt, the presumption is always in favour of the freehold.

Lease—Property Mortgaged

59. A mortgage placed on property after a valid lease to the property has been given will not affect the rights of the tenant, and the mortgagee is able to obtain possession only on the termination of the lease or after a notice to quit given by the mortgagee according to the terms of the lease.

If a lease is made after a mortgage it is valid and binding, but it is subject to the mortgage. In that case if the mortgagee should foreclose or take possession of the property he can eject a tenant without notice—unless the mortgagee had concurred in the lease, in which case the lease will be valid against him and he cannot evict the tenant before the lease expires.

If a mortgage contains the usual attornment clause, the mortgagee to whom payments are in arrears may give notice to the tenant that the rent is to be paid to him, and the mortgagee then takes the place of the landlord. He may distrain for rent falling due after the notice. It should be observed that if under the conditions stated the tenant pays rent to the mortgagee who applies the payments on mortgage interest, etc., this does not give a new date from which the Statute of Limitations will run as applied to the mortgage. The payment is not made by the mortgagor.

In case a lease is made prior to the mortgage and the tenant refuses to pay rent to the mortgagee, the mortgagee may bring action for possession.

Annuity Charge on Land

60. An annuity charge is not the same as a rent charge. It is not charged upon the lands and does not issue out of the lands, but it stands against the person holding the land. An annuity accrues from day to day as interest does, and if a person who is entitled to an annuity because of lands held by another should die in the interval between the payments, his representatives would receive the proportion up to the date of death. If a person leaves another an annuity of $300.00 but does not express the land out of which it is to issue, no land can be charged and the annuity is a personal one against the individual responsible for its payment.

Examination Questions

COMMERCIAL LAW

Lesson 9

NOTE.—You will submit written answers for Questions 3, 4, 8 to 33 inclusive. If you are in doubt as to the correct answers for the remaining questions, kindly consult our Instruction Department.

1. Distinguish between the terms "Property" and "Estate".

2. (*a*) Describe an estate in fee simple.
   (*b*) What is meant by a "lifetenant"? Discuss fully the legal rights and obligations of a lifetenant.

3. Distinguish between a "joint tenancy" and a "tenancy in common".

4. What is (*a*) a reversion? (*b*) a remainder? Illustrate by examples.

5. Describe briefly the Torrens System.

6. What is a Warranty Deed and in what connection is it used?

7. It is sometimes said that a mortgage is a deed of conveyance with a proviso. Explain.

8. What is the law with regard to prepayment of mortgage?

9. What do you understand by foreclosure? What are the rights of the mortgagor in this connection?

10. What is the "personal covenant" in a mortgage? How may it come into effect should the mortgagee act under the "power of sale" clause?

11. Outline in sentence paragraphs the law relative to interest on mortgages.

12. Distinguish between the idea of renting "for a month" and renting "by the month".

13. What is the law with regard to notice to quit as applied to—
   (*a*) A lease for a year?
   (*b*) A yearly lease?

14. A leases a house from B and the lease states that A is to have the house "for one year certain and so on from year to year". The

(Continued on next page)

lease is dated June 1st, 1946. What is the earliest date on which B can regain possession, and how would he go about it?

15. A is a monthly tenant in B's house. B wishes to raise the rent from $40.00 to $50.00 a month to take effect May 1st. How will he do so?

16. Distinguish between an "option to purchase" and an "agreement of purchase and sale".

17. Explain the nature and purpose of a Caveat or Caution.

18. In what form should a Right of Way over the land of another be expressed? Describe the extent of the rights of the person to whom it is given and state the obligations of the parties concerned.

19. Smith sells a piece of land to Brown and is paid for it. The deed is handed over but not registered. Smith later, by mistake, sells the same lot to Jones, who registers his deed. Jones searches the registry office and finds no record of the deed to Brown, but he is told before he makes his deal that Brown has bought the lot. Which—Brown or Jones—is entitled to the lot?

20. A gives to B an option of purchase in writing, there being no consideration, and states in the option that B has ten days within which to accept and make the first payment. Can A withdraw his option before the ten days are up? Can A sell the property to another before such time? Give reasons for your answer. Nothing was stated as to the option being assignable. Can B assign same so as to give his assignee any rights?

21. (*a*) A owes B $1,000.00 on a mortgage on real estate; B assigns the mortgage to C, but no notice of the assignment is given to A. A afterwards pays the amount of the mortgage to B, who leaves for parts unknown. Can C collect the amount of the mortgage from A? Give reasons for answer.

Supposing, however, A owes B the money on a promissory note and B endorses the note for value to C, and afterwards A pays the money to B, can C collect the amount from A? Give reasons for answer.

(*b*) When a mortgage is assigned, how is notice given to the public in general as distinguished from that given to the mortgagor?

22. What leases require to be registered in order to be good against purchasers of the land from the landlord?

(*Continued on next page*)

23. (*a*) A tenant holds real property under a lease for two years. Does either landlord or tenant require to give notice before the end of the lease?

    (*b*) At the end of the lease nothing is said and the tenant stays on. He pays rent monthly as he always did and the landlord accepts it. What notice must be given by either landlord or tenant in order to end the lease?

24. Outline in sentence paragraphs the rights of a landlord if a tenant who has received due notice to quit refuses to give up possession. Does such a person pay rent? Explain.

25. If nothing is said about it in a written lease, or if it is a verbal lease and nothing is said about the subject, who has to make the repairs?

26. A leased real property from B. After the lease was given, B mortgaged the property to C. Does the mortgage affect the lessee, A, if C should take steps to gain possession of the property? Explain.

27. D leased real property from E and at the time the lease was given there was a mortgage on the property in favour of F. Should F foreclose under the mortgage, what is the legal position of D?

28. G, the owner of mortgaged property, rented the property to H but failed to pay interest on the mortgage and the taxes. What are the rights of I, the mortgagee, as to the lease?

29. Is the acceptance, by the landlord, of the key to rented premises before the lease has expired conclusive evidence that he has accepted possession of the property? Explain the rights of the landlord. Would it make any difference if the landlord re-let the premises?

30. What are the rights of a mortgagee to bid for the purchase of property being offered for sale under the "power of sale" clause in the mortgage? What, if any, difference would it make if the property is being sold under an order by the Court?

31. (*a*) What is a riparian owner?

    (*b*) Summarize the rights of a riparian owner when a stream flowing through his property flows also through the property of other persons.

32. A and his wife held real property as joint tenants. What is the effect on the joint tenancy if A is declared a bankrupt?

33. (*a*) What is meant by the term "distrain"?

    (*b*) Under what condition, if at all, may a mortgagee distrain for arrears of mortgage interest?

COMMERCIAL LAW

Lesson 10

GUARANTEE AND SURETYSHIP

Nature of Contract

1. A contract of Guarantee or Suretyship is an agreement whereby one person (the guarantor or surety) becomes responsible to another (the creditor) for the debt, default or miscarriage of a third party (the principal debtor).

Who is a Surety?

2. "Guarantee" and "Suretyship" are not exactly of the same meaning. A Surety is one who *unconditionally* promises to answer for the debt of another. For example, A gives B the following promissory note—

$100.00. Toronto, Feb. 8, 1948.
Thirty days after date
I promise to pay B or order.....
One Hundred..... $\frac{xx}{100}$ Dollars
Value Received.

A
C Surety

By signing the note as above, C binds himself to pay the note when due. He does not bind himself to pay if A cannot or does not, but binds himself to pay the note when due. His obligation is not conditional upon A's failure to pay. When the note is due, B may bring action against C without making any demand on A or without receiving A's refusal to pay.

Who is a Guarantor?

3. On the other hand, any one who promises to answer for the debt of another *upon condition* that such other person does not or cannot pay, or upon any condition whatever, is a Guarantor. For example, suppose that C, instead of signing as illustrated, wrote on the back of the note—

"I guarantee payment of this note when due.
C."

The contract of C is that of a guarantor. His liability depends upon A's failure to pay at maturity. B must demand payment of A before

he can proceed against C. It is not necessary to give C notice of A's failure to pay, but it is good practice to give him such notice.

Endorser's Liability

4. It may be noted in passing that C might have made himself liable as endorser by simply signing his name on the back of the note. In such case the liability of C is conditional upon two facts: (1) that the note is presented to A for payment; (2) that upon failure of A to pay C is given prompt notice of the default. The endorser is also liable upon certain implied warranties as set out in section 133 of the Bills of Exchange Act.

> "The endorser of a bill, by endorsing it, subject to the effect of any express stipulation hereinbefore authorized—
>
> "(*a*) engages that on due presentation it shall be accepted and paid according to its tenour, and that if it is dishonoured he will compensate the holder or a subsequent endorser who is compelled to pay it, if the requisite proceedings on dishonour are duly taken;
>
> "(*b*) is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous endorsements;
>
> "(*c*) is precluded from denying to his immediate or a subsequent endorsee that the bill was, at the time of his endorsement, a valid and subsisting bill, and that he had then a good title thereto."

Forms of Guarantee and Suretyship

5. While we have used a promissory note to illustrate the possibility of being liable as surety, or as guarantor, or as endorser, we will understand that the first two forms of liability may exist in many other connections. For example, we may have contracts of guarantee or suretyship to secure contracts of personal service, for the construction of buildings, for mercantile transactions, or in fact for any kind of business transaction.

Requisites of Contract

6. With this ground cleared, we may proceed to discuss these particular contracts in the light of the requisites that must be found in all contracts, viz. (*a*) competent persons, (*b*) mutual consent, (*c*) lawful object, and (*d*) sufficient consideration. The first presents no peculiar features. The ordinary rules as to competent persons apply. The second presents the usual point that a contract of guarantee or suretyship is formed by offer and acceptance. The offer of guarantee or surety is not binding until its acceptance by the creditor. This acceptance may be given by implication if the offer does not contem-

plate express acceptance. For example, an offer to guarantee a supply of goods may be accepted by supplying the goods; a guarantee of fidelity may be accepted by giving employment to the person whose conduct is guaranteed.

7. The subject of legality of the object of such contracts presents no peculiar feature. In discussing the fourth item, sufficient consideration, some points may be emphasized. Every guarantee not under seal must be supported by valuable consideration. While the presence of consideration should be indicated in writing, it would not seem to be an actual necessity to do so.

Special Points re Consideration

8. If the contract of the party agreeing to answer for the debt of another is made at the same time, and is part of the same transaction as the contract between the debtor and the creditor, the consideration supporting that contract will also support the contract of guarantee or suretyship. For example, A wants to purchase $100.00 worth of goods from B, and B refuses to make the sale unless C signs a contract of guarantee for the value of the goods. C thereupon signs the following document and hands it to B.

Toronto, Feb. 8, 1948.

To B.

Give A credit for goods to the amount of $100.00. If he does not pay you, I will.

C.

B then gives A the goods. The consideration, namely the receipt of $100.00 worth of goods delivered to A and which supports A's promise to pay B, will support C's promise to indemnify B should A fail to pay for the goods.

If the contract of guarantee or suretyship is entered into after the original obligation is incurred, and independently of it, then there must be a separate and independent consideration to support it. For example, if A bought goods from B on three months' credit and at the end of one month B—fearing A's inability to pay—asks him to furnish a guarantee from C, such guarantee must be founded upon valuable consideration given to C.

Written Contracts Required

9. We come now to the bearing of the Statute of Frauds upon these contracts. This famous statute among other things enacted as follows—

"No action shall be brought whereby to charge any person upon any special promise to answer for the debt, default or miscarriage

of any person unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing signed by the party to be charged therewith or some person thereunto by him lawfully authorized."

This means that a contract of guarantee or suretyship must be in writing to be enforceable. An oral promise is not illegal. The parties may voluntarily carry it out if they choose. The law simply says that it is not enforceable. If an action is brought on an oral promise of this nature and the defendant objects, for the reason that there is no writing signed by him, the plaintiff is immediately non-suited.

The words "debt, default, or miscarriage" include every case in which one person can become responsible for such acts or conduct of another as will support a civil action. This includes not only breaches of contract but also torts. Torts are injuries done to the person or property of another—such as trespass, assault and battery, and slander.

The words "of another person" need careful attention. Thus if two persons go into a store, the one known to the storekeeper and the other a stranger to him, and the first person says to the storekeeper: "Let him (the stranger) have goods and, *if he does not pay you I will*", this is a promise to answer for the debt of another and unless in writing would be of no use to the storekeeper. However, if this person says: "Let him (the stranger) have goods and I will pay you", this is an entirely different case and no writing is necessary under this clause of the Statute of Frauds. It is the promissor's own debt and the fact that goods are delivered to another person at his request will not alter the fact.

Special and General Guarantees

10. Guarantees are "special" when addressed to a particular person, and "general" when addressed to the public. The amount for which the guarantee is given may be limited or it may be unlimited. The liability of the guarantor may be limited to a single transaction while a "continuing" guarantee covers a series of transactions. The following is a form of Special and Limited Guarantee—

Toronto, Feb. 8, 1948.

W. R. Brock & Company, Ltd.
Toronto, Ont.

Gentlemen: If you will kindly allow Mr. John Doe credit for sixty days on a bill of goods not to exceed Five Hundred Dollars, I agree for value received to guarantee the prompt payment of the bill.

Yours truly,

Richard Roe.

The following is a form of Continuing Guarantee—

Toronto, Feb. 8, 1948.

In consideration of One Dollar, the receipt of which is hereby acknowledged, I hereby guarantee the payment of all goods purchased by John Doe from Richard Roe during the remainder of the year 1948.

John Jones.

Illustrations

11. Having seen how the contract is formed it is in order, as with any contract, to see how it is discharged—

(*a*) Payment of the debt by the principal.

A owes B $100.00. C, in writing, guarantees payment of this debt. A pays B. C is thereby discharged.

(*b*) Fraud or Duress.

A is indebted to B and C guarantees A's debt. If B procured the contract with A by fraud or under duress, or procured the contract of guarantee from C by fraud or duress, C can avoid the contract of guarantee by reason of the fraud.

On the other hand, if the guarantee is procured through the fraud or duress of A without B's knowledge or consent, the fraud or duress will not avail C as a defence to an action brought by B upon the guarantee.

(*c*) Agreement.

The creditor may, by express agreement, release the guarantor or surety. The agreement may also be implied, as where the creditor voluntarily discharges the debtor.

(*d*) Alteration.

If the principal contract is materially altered or a new contract substituted without the consent of the guarantor or surety, the latter is discharged. The guarantor or surety may not be injured by the change, but he is nevertheless discharged.

If the contract of guarantee is altered while in possession of the creditor, the guarantor is discharged.

(*e*) Extension of Time to Debtor.

A valid agreement, for valuable consideration, made between debtor and creditor, by which time is extended to the debtor, will discharge the guarantor or surety. The mere omission on the part of the creditor to press his claim will not so operate.

For example, A owes B $1,000.00 payable March 1st. C, in writing, guarantees payment of this debt. B does not collect from

A on March 1st but simply lets the debt run on till April 1st. C is not thereby discharged.

If B, however, in consideration of A's promise to pay him interest at a certain rate after March 1st, agrees to extend the time till April 1st, C is thereby discharged.

(*f*) Loss or Surrender of Securities.

The guarantor or surety, upon paying the debt, is entitled to receive from the creditor the securities, if any, placed in the creditor's hands. If, before default, the creditor surrenders the securities to the debtor or loses them, the surety is discharged to the extent at least of any loss sustained, if not altogether.

(*g*) Performance.

Obviously the guarantor or surety is discharged if, upon failure of the debtor to meet his debt, the guarantor or surety pays it.

After payment, the surety has all the rights of the creditor against the debtor in respect to the debt guaranteed. He has a right, therefore, to the benefit of all securities given by the debtor to the creditor—whether or not he knew of them at the time he entered into the contract of guarantee or whether or not they existed at the time of the guarantee.

The surety's right against the debtor is for indemnification for the amount he actually paid for the debtor, plus interest. If he sustained damage beyond that he can recover the additional amounts.

Indemnity Distinguished from Guarantee

12. As has been pointed out, a guarantee is a promise to meet the debt of another if he (the debtor) fails to do so. An Indemnity is very similar to what has been pointed out relative to suretyship. It is a promise to indemnify another person against loss incurred through entering into a contract with a third person at the promisor's request. This is independent altogether of the question whether such a third person makes default or not. A contract of indemnity may be enforced even if verbal as it does not come within the Statute of Frauds. A contract of indemnity may refer also to indemnification against loss as in contracts of insurance and fidelity companies.

Primary Liability Distinguished from Guarantee

13. If A tells a storekeeper to give B goods and charge them to him or if A tells the storekeeper that he will pay for the goods, A is primarily liable. In other words, A is the primary debtor. The above, it is clear, differs from an ordinary guarantee since the question of

default does not enter in, and differs from a contract of surety or of indemnity in that the charge is made primarily to A.

Co-Sureties

14. Suppose that A and B together act as sureties on a note for $500.00 given by C and that there is a joint or common liability. If A paid $300.00, he would have to try to collect $50.00 from B, the assumption being that they are to contribute equally. If the bill drawn on C was for $700.00 instead of the $500.00 agreed upon, the sureties would be released. The same would be true also if one person alone acted as surety in such a case and the bill is drawn for an amount greater than had been agreed upon and to which the suretyship applies.

CORPORATIONS

- Corporations
  - Sole
  - Aggregate
    - Public
      - Towns
      - Cities
      - Counties
      - Provinces
    - Quasi-Public
      - Transportation Lines
      - Gas and Electric Light Companies
    - Private
      - Ecclesiastical
        - Church Organizations
      - Business
        - Banking
        - Manufacturing
        - Trading
        - Financial
        - Insurance Companies

15. The word "corporation", as the preceding table will show, is used to describe institutions differing widely in their purpose. The first broad classification is into corporations sole and corporations aggregate.

16. An illustration of the corporation sole is that of a bishop or other church dignitary holding property or rights for a church.

17. The corporation aggregate presents two major divisions—public and private, with a class falling between these two and listed as quasi-public corporations.

18. The public corporation is an agency created by the state to enable towns, cities, etc., to administer public affairs. This is what

we have in mind when we speak of the Corporation of the City of Montreal, for example.

19. Private corporations are divided into ecclesiastical and business. The most familiar illustration in Canada of the business corporation is the incorporated joint stock company.

Note: There should be no confusion as between a private corporation and a private company. All limited companies are private corporations—but the majority of them are public companies. This distinction is made clear in Company Law.

20. The quasi-public corporation is in reality a private organization which enjoys a right or franchise from the public. A good illustration is a privately-owned street railway system enjoying the privileges of operating on the streets of a city.

INCORPORATED JOINT STOCK COMPANIES

(Limited Liability Companies)

Introductory

21. There are nine provinces in the Dominion of Canada. Each province has power to legislate with regard to the incorporation of Joint Stock Companies and so also has the Dominion. It will thus be seen that we have in Canada ten different sources of Incorporated Joint Stock Company Law.

The Under-Secretary of State at Ottawa once undertook to publish a volume of some 1500 pages containing the different provincial and also the Dominion enactments regarding these Joint Stock Companies. In the preface he was forced to admit that even while the book was on the press it was out of date, on account of the many amendments that had been put through by the provincial legislatures and by the Dominion Parliament after the copy had been given to the printer.

This is not mentioned with the idea of discouraging the student, but rather with the idea of giving the reason for our method of treating the subject. What follows will be a statement of the general theory regarding the formation and operation of companies. With this foundation laid, the student should be able to read the accurate detail of any Joint Stock Company Act in which he is interested.

22. Before proceeding, we pause to note that in the Province of Quebec we may have a Joint Stock Company which is not an incorporated company. Such companies are authorized under the Quebec partnership law and possess all the characteristics of a partnership with this exception—the share or interest of any member may be

transferred without causing a dissolution of the partnership which is ordinarily the case in a partnership.

In Canada, the predominant idea is that the term "Joint Stock Company" signifies a corporate existence—that is, the company has a legal existence of its own as an artificial individual created by law. It is with such companies that we intend to deal.

What is an Incorporated Joint Stock Company?

23. In the year 1917, The Bank of Montreal celebrated the one-hundredth anniversary of its founding. Naturally not one of the founders was present at that birthday celebration, and yet The Bank of Montreal is still a going concern. Throughout these hundred and more years it is safe to say that the entire membership of this great business organization has changed not once but several times—and yet The Bank of Montreal is still in existence.

24. In a partnership it is different. If one partner dies or becomes insolvent the partnership is at an end. If, for any reason, one partner withdraws, the partnership is dissolved. This contrast is summed up in the statement that an incorporated company is endowed with continuous existence, while a partnership is not. An incorporated company has an existence apart altogether from the existence of its members, while a partnership has not.

Smith, Jones, and Robinson are members of a partnership. The identity of some members may be hidden from the public in the firm name of Smith & Co., but not from the law. For example, if it becomes necessary to sue the firm, Smith and Jones and Robinson will become painfully aware of the fact, because they will be individually mentioned in the action and will find themselves individually responsible if the suit goes against them. On the other hand, if these three men were members of a Joint Stock Company and an action were taken against the company, they would not be disturbed individually. The company has an existence of its own and the law is not concerned with the individuals composing it.

Hence it comes that an Incorporated Joint Stock Company is sometimes described as an artificial individual created by law.

Characteristics

25. The following characteristics will be noted—

(*a*) The company has a legal existence of its own and so is an entity separate from the members who compose it. Because it is a separate entity it is not dissolved by the death, insolvency, or withdrawal of its members. The withdrawal of members is effected

through the transfer of shares to other persons who take the place of those who withdraw. If a shareholder dies, his shares form part of his estate and may be transferred to his heirs or disposed of to other persons.

(*b*) The company may take and hold property in the corporate name. The title to such property is in the company and not in its members as individuals, either separately or collectively. (A partnership is not an entity separate from its members and hence its property would be held in the names of the partners.)

(*c*) The company may sue and be sued like a natural person.

(*d*) Debts incurred and contracts made in the corporate name are the debts and contracts of the company and bind the assets and property of the company. The individual members are not liable on such debts or contracts unless statutes rule otherwise.

(*e*) The company may contract with its own members and may sue them and be sued by them.

(*f*) The liability of the shareholders of a company is limited to the amount they have promised to contribute to the assets in return for shares issued to them.

How Formed

26. A partnership is formed by the will of the partners. They decide that they want to become partners and that settles the matter. No power can tell them that they can or cannot. The partners will file a certificate at the office required under the provincial law, giving particulars as to the membership of the firm. The formation of an incorporated joint stock company is not quite so simple. While it is true that an incorporated company also has its genesis in the thought of certain persons that they would like to form a company, the company is formed only when the sovereign power represented by Legislature or Parliament gives consent.

Sometimes this consent has to be obtained in the very formal way of having a special Act of Parliament or Legislature passed. This is the case with companies such as those conducting banking, insurance, railway, and similar enterprises of great magnitude. Naturally, these Acts cannot be passed unless Parliament or Legislature is in session.

The greater number of companies for ordinary business affairs are incorporated in a less formal way, and at any time of the year, by complying with certain regulations laid down in Joint Stock Company

Acts. It is with these last-mentioned companies that we intend to deal.

Procedure

27. Some one must act on self-delegated authority, for a time at least. If Dominion incorporation is sought, the Secretary of State at Ottawa is addressed. If Provincial incorporation is sought, it is the Provincial Secretary, or the Registrar of Companies at the provincial capital, who is addressed.

The Petition

28. The object of addressing this official is to get a copy of the Act and such other papers and forms as are sent out to those seeking incorporation. The petition is an outstanding form. When properly filled in and signed, it presents the formal request, or petition, for the bringing into existence of a new company.

Memorandum of Agreement and Stock Book

29. Accompanying the petition, there must be a properly completed memorandum of agreement and stock book as illustrated—

(*To be executed in duplicate; both to be sent to, and one deposited in, the office of the Provincial Secretary.*)

..... *Limited*

MEMORANDUM OF AGREEMENT AND STOCK BOOK

We, the undersigned, do hereby severally covenant and agree each with the others to become incorporated as a.....company under
(If private, insert here)
the provisions of The Companies Act under the name of..... Limited, or such other name as the Lieutenant-Governor may give to the Company, with a capital of.....Dollars divided into.....shares of.....dollars each.

And we hereby severally subscribe for and agree to take the respective amounts of the capital stock of the said Company set opposite our respective names as hereunder and hereafter written, and to become shareholders in such Company to the said amounts.

Witness our hands and seals.

Name of Subscriber	Seal	Amount of Subscription	Date and Place of Subscription		Residence of Subscriber	Name of Witness
			Date 19..	Place		
.....	.....	.....	.....	.....	.....	.....

Capital Stock, Shares, Calls

30. The petition must state, among other things, the proposed amount of capital stock and its division into shares. A person may become a shareholder by signing the stock book, agreeing to take a certain number of shares. The original shareholders come into the company in this way. Later, when stock is offered for subscription, a person may become a shareholder by making application for a certain number of shares and having his application accepted by the company.

31. Shares are paid for generally by responding to calls levied by the directors from time to time. It is also possible that shares may be received fully paid from the outset, as where one sells a business to a company and takes fully paid stock in return. It is also possible that the owner of shares may sell them to another, thus introducing a new shareholder into the company.

The Petitioners

32. Generally speaking, at least three persons of the full age of 21 years must sign both petition and stock book. The latter shows the government that the petitioners are in earnest, because they have entered into a solemn contract under seal to take and to pay for certain shares in the proposed company, provided that the government sees fit to incorporate the company. It is interesting to note in this study of Joint Stock Companies, that we are again studying a phase of the Law of Contracts.

33. The petition, properly completed; the memorandum of agreement and stock book, properly completed in duplicate; the government fee for incorporation; affidavits verifying signatures; and other documents required by the regulations are returned to the proper official and the matter is now in the hands of the government. The company is not formed until the government indicates that the petition has been favourably received, notice of which is published in the official Gazette of the Dominion or of the province as the case may be.

Letters Patent

34. In New Brunswick, Quebec, Ontario, Manitoba, and also in the case of Dominion incorporation, limited companies are given existence by the issue of Letters Patent, sometimes referred to as the Charter of Incorporation. In the other provinces, companies are formed by registration—the agreement being filed in the office of the Registrar of Joint Stock Companies, and a Certificate issued.

Public vs. Private Companies

35. It may be well at this point to note that companies may be Private or Public. Each Companies Act outlines the restrictions which

bring a company under the classification of a Private Company. Generally speaking, the Private Company is distinguished by the facts that the membership is limited, shares are not offered to the public, and the right to transfer shares is restricted, e.g., shares may not be transferred without the consent of the directors.

The Prospectus

36. A public company which offers shares or bonds to the public must publish a prospectus. The various Acts requiring this are very explicit on the information that must be found in the prospectus. There was a time when a prospectus was written largely from the imagination and was characterized very often by absolute mis-statement. Now, a prospectus must lay bare every fact that a prospective shareholder should know if he would enter the company with his eyes open.

Directors

37. The Petition mentions a number of the applicants who are to be considered provisional directors. It also mentions the location of the head office of the company. The government is thus in a position to know where and with whom business may be transacted concerning the formation of the company.

38. When these provisional directors receive notice that the petition has been favourably received and that the company is brought into existence, one of their first duties is to call a meeting of all members of the new company for the purpose of perfecting plans for the organization of the new company. Among other things to be attended to are the election of the first board of regular directors and the adoption of by-laws if the company is brought into being by the issue of Letters Patent. Companies formed by registration have Articles of Association, the purpose of which is similar to that of by-laws.

A director must be a shareholder (and not in arrears with respect to any call levied), or hold shares as a trustee, etc., or be the representative of another company that holds shares.

The directors are elected by the shareholders on the plan of giving each shareholder a vote for each share that he holds. The election is generally by ballot.

39. The shareholder, or group of shareholders, that controls more than fifty per cent of the shares naturally elects the board of directors. For instance, a company has a capital stock of $100,000.00 divided into 1000 shares, of $100.00 each. One man owns 501 shares of the stock. The rest of the stock is held by 499 men who each hold one share. This means that at any meeting of shareholders 500 men may

have a right to appear and to vote. Nevertheless one man entirely controls the voting, because he can cast 501 votes while the best that all the others can do is to poll 499 votes. This simple illustration will give an idea of what is meant when we hear of a one-man company or of the rights and wrongs of minority *v.* majority shareholders.

Once the board of directors is elected, the affairs of the company—in so far as they relate to ordinary operation—are out of the hands of the shareholders and in the hands of the Board. In other words the shareholders, who may number hundreds and even thousands in some companies, have delegated the authority to manage the affairs of the company to a small committee known as the Board of Directors. Unless a shareholder is elected to this Board, the nearest approach that he has to any part in the management is the casting of his vote at the election of Directors.

President, Vice-President, Officers

40. One of the first duties of a newly elected Board of Directors is to hold a meeting of the Board and to elect from among themselves a President and possibly a Vice-President. The Board also appoints such officers as Manager, Secretary, and Treasurer. Everything is now in order for carrying on the business for which the company was formed.

Commencing Business

41. A company is formed, or brought into existence, when the government favourably answers the petition of the incorporators. It may then proceed with organization affairs as above noted, but it may not commence business until it is shown to the satisfaction of the government that it has complied with certain requirements laid down in the Act. Generally speaking, these relate to the issuing of a certain proportion of the stock and to the receiving of a certain amount in payment on such stock. Some of the Acts require that the company must not only submit evidence of these requirements being fulfilled, but must receive a certificate from the government entitling it to commence business.

Books to be Kept

42. All the Acts require that the books of record shall be kept at the head office and that these books of record shall be open to inspection by shareholders and creditors. The books of record are usually outlined as follows: (1) Copy of Letters Patent and By-laws (or Memorandum and Articles of Association), (2) Register of shareholders past and present, (3) Stock Ledger showing the stock held by each shareholder and amount paid in on such stock, (4) Record of transfers of stock, (5) Register of Directors past and present.

Companies are required to keep a record of minutes of meetings of directors, shareholders, etc. These minutes are not open to inspection except by the directors.

43. The above books or records are to be sharply distinguished from books of account, which are not open to inspection. Neither a creditor nor a shareholder (unless he is a director) has any right to ask to see the Cash Book, the Ledger or any other book of account.

As the Company Acts generally require a company to submit to its shareholders a Balance Sheet and a Statement of Revenue and Expenditure, it follows that company accounts must be kept on the double entry principle. Some of the Acts are more definite than others as to specific information that must be disclosed in the operating statements and balance sheet.

Annual Meeting, Statements

44. The directors must give account of their stewardship at the annual meeting of shareholders. The by-laws may state the date of this meeting, but if not the directors must call the meeting within the time prescribed in the Act. Some of the Acts are quite specific as to the detail of information that must be submitted to the shareholders in the Profit and Loss Statement, the Balance Sheet, and (in some cases) the Statements of Surplus. All the Acts are quite specific in the requirement that books be audited and that the auditor's report be submitted along with the statements mentioned.

Annual Statement to Government

45. The government which brings a company into existence will require that company, once a year, to fill in a blank form furnished by the government, and return it to the department of the government dealing with companies. A copy of this form, filled in, is to be posted up in the head office of the company. The information contained in the form is not what would be found in the Profit and Loss Statement or in the Balance Sheet but relates to the number of shareholders, transfers of stock, etc. Such information can be made public without detriment to the company.

Dividends

46. It is the natural hope of the shareholders that the Profit and Loss Statement will show a profit for the year. If it does, the directors may decide that part or all of this profit shall be distributed among the shareholders. The word Dividend means that which is divided. In a joint stock company, the dividend is that part of the profits which is divided among the shareholders as a return on their investment.

It is obvious that if there is no profit there can be no dividend—but it is also to be noted that there may be a profit but no dividend. The disposal of the profit is a matter entirely in the hands of the directors. There is no law to compel directors to pay a dividend because there is a profit.

Reserve Fund

47. The directors may see fit to set aside part or all of the profits in any year with the idea of building up a Reserve Fund. This is simply a provision against unforeseen contingencies. For example, unexpected losses in a certain year may make it very desirable to have a fund against which to write off such losses.

Limited Liability

48. From what has been stated it will be seen that the ordinary shareholder, unlike the ordinary partner, has very little to do with the actual management of the company. It follows naturally that there should be a limit to his liability. This is generally indicated by the use of the word "Limited" as part of the name of the company. It is simply a warning to the public that in dealing with such a company it must be understood that no liability can attach to the individual shareholder once he has paid in full for the shares for which he has subscribed. Incorporated Joint Stock Companies are referred to frequently as Limited Companies or Limited Liability Companies.

49. Shareholders of Canadian chartered banks are under a liability that goes beyond that of shareholders in other corporations. Until 1934, if a bank suspended payment, the shareholders were liable to an amount equal to the par value of their shares in addition to any amounts unpaid on their shares. This was called "double liability". This liability now is not double but is in the proportion that the outstanding note issue of the bank bears to its unimpaired paid-up capital.

Until the end of the year 1949 banks have authority to issue their own notes up to 25 per cent of their paid-up capital. If, within that period, a bank issued its own notes up to 25 per cent of its paid-up capital, a bank shareholder—after he has paid the amount agreed upon for his shares—would have a further liability up to 25 per cent of the par value. That additional liability will cease with the right of note issue at the end of 1949.

50. In those provinces where companies are formed by Registration, provision is made for the incorporation of companies with liability "Limited by Guarantee", in which case the members of the company bind themselves to contribute to the assets of the company a certain sum, not exceeding a specified amount, in case the company is wound up while they are members.

Authorized Capital

51. It may now be in order to explain certain terms. Let us imagine a company in which the petitioners have named $100,000.00 as the limit of stock which they expect to issue, and that for convenience in inviting subscriptions this has been divided into 1000 shares of $100.00 each. The $100,000.00 is spoken of as the Authorized or the Nominal Capital.

Subscribed Capital

52. At a certain time, it is shown from the records that ten men have each subscribed for 50 shares. We would call $50,000.00 the Subscribed Capital.

Paid-up Capital

53. Calls have been levied by the company asking each shareholder to pay 25 per cent of his subscription. These calls have been promptly met. We would call that $12,500.00 the Paid-up Capital. It is assumed in this case that the shares are issued at par, i.e., the face amount. To meet all the cases, Paid-up Capital may be defined as the amount of consideration received on account of shares issued that is applied to the stated or legal capital.

If shares with a par value of $100.00 are issued at $110.00, only $100.00 a share will be recorded as stated or legal capital when the shares are paid in full.

If shares without par value are issued and a part of the credit is made to distributable surplus, it is the balance only that is recorded as stated or legal capital.

From the above it will be obvious that it would not always be correct to define Paid-up Capital as the amount of consideration received on account of shares issued.

It should be noted that the consideration may be cash or other assets, tangible or intangible, including services.

Stock Certificate

54. When the time comes that a subscriber for stock has paid his subscription in full, he is entitled to a Stock Certificate. For instance, the subscriber for 50 shares who has responded to calls from time to time until he has paid in $5,000.00, gets a certificate setting forth the fact that he holds 50 shares fully paid up.

Par Value

55. Nominally this subscriber's holdings in the company are worth

$5000.00. This is what is meant when we say that the Par Value of each share is $100.00 or that the Par Value of 50 shares is $5,000.00.

Market Value

56. With this stock certificate in hand, the stockholder may sell out his interest by transferring the certificate to any one who will buy it. What he gets for the certificate is known as the Market Value of the stock and it may be more than the par value, in which case we say the stock is at a Premium. It may be less than the par value, in which case we say the stock is at a Discount. It may be just the same as the par value, in which case we say that the stock is at Par.

In this respect, stock is not different from anything else that we may buy and sell. A man may pay $5,000.00 for a horse to-day. To-morrow the horse may break its leg and the owner cannot get $5.00 for it. A company may "break its leg" in the sense that the directors so mismanage affairs that an enormous loss is the result and no one would want an interest in the company as a gift. It is also quite possible that, even under the best of management, conditions may preclude success.

57. It follows that the statement on a stock certificate for 50 shares that they have a par value of $5,000.00 has very little meaning once the company goes into operation. This may serve to show why shares are sometimes issued without par value. The man who buys 1 share in a company which divides its capital stock into 1,000 shares is simply buying a one-thousandth interest in that business. We frequently hear of a man buying a certain interest in a partnership for a certain amount of money without any mention of the par value of his interest. It would seem to be just as easy to buy an interest in a Joint Stock Company without any reference to par value.

Watered Stock

58. We have pointed out that while some subscribers for stock may pay for the stock in cash, it is quite possible that others may pay for stock by turning over certain property to the company. For instance, the owner of a grocery business joins with four other persons to form a company which will take over the business and operate it. A quite legitimate arrangement may be made to let him pay for stock for which he subscribes by turning over his business to the company. In a like manner, one may make arrangements to pay for stock by turning over to the company a patent right, a franchise, a mine, or any other thing of value.

What is a certain business worth? What is a certain patent, or a certain mine worth? It is all a matter of opinion. It is all a matter of

driving a bargain. Sometimes, when the owner of the business, mine, patent, or whatever it may be, receives an amount of stock with a face value greater than the real value of the consideration he gives, we hear that the stock issue is watered or the stock is spoken of as Watered Stock. It is quite beside the mark to describe watered stock as stock given to certain persons without any value being received in return. No board of directors is so foolish as to make a present of stock to any one. The members of the Board would be individually liable for payment of such stock.

Preferred Stock and Common Stock

59. Sometimes an issue of stock is divided into two classes, preferred and common. The holders of the preferred stock enjoy certain advantages which are clearly set forth in the charter or by-laws creating it. It may be that they enjoy the advantage of electing a certain number of directors. If the company is wound up, it may be that these preferred stockholders have a first claim on the assets in repayment of what they have paid into the company. The most common form of preference is that of having a first claim on any distributed profit for the payment of dividends. Thus "5 per cent Preferred Stock" conveys the idea that, if there are any profits distributed, these profits must first be applied to paying the preferred stockholders a 5 per cent dividend. Other stockholders rank as holders of Common Stock who will receive any further profits distributed.

60. Ordinarily, if a preferred dividend is not declared and so not distributed, no claim rests against the company to pay that dividend later. Sometimes, however, it is provided that the preferred shares shall be Cumulative, which means that if dividends are passed for any period those arrears must be made up before any dividends are declared on the common. It should be observed that it is the preference, and not the dividends, that is cumulative. There is no liability at all for a dividend until it is declared. The dividends may never be declared.

61. It must be clearly kept in mind that the holders of preferred shares are not guaranteed a dividend. The idea is only that if there are profits and a part of these is appropriated to dividends, the rate attached to the preferred shares must be provided for before any dividend is declared on the common. A company is not compelled to declare dividends even when it has profits. The dividends will be declared when, in the opinion of the directors, it is safe and desirable to do so.

Bonus Stock

62. Sometimes, as an inducement to subscribe, common shares are offered and given as a bonus to subscribers to preferred stock.

It must be understood that shares cannot be issued as a bonus. It is not the company that gives the bonus stock. Any shareholder who has subscribed and given the agreed consideration for his stock may sell it or give it away as he pleases. The common stock given as a bonus has been issued and fully paid for some consideration; and the holders of the common stock transfer a portion of their shares to a trustee who, in turn, transfers them as a bonus to the subscribers to the preferred.

The shareholder who thus gives paid-up common stock to be donated as a bonus is not generally one who has paid cash for such stock. He may be a promoter who has received this paid-up common stock in payment for services rendered in organizing the company. He may be a person who has sold out a business to the company and who has received a liberal allotment of paid-up common stock in payment of the goodwill of the business.

Deferred Shares

63. Those who organize or promote a company are sometimes paid for their services in stock of the company. Sometimes it is provided that such stock is not to draw dividends until certain dividends are paid on the other shares issued. This explains the meaning of the term "Deferred Shares".

Stock Dividend

64. Ordinarily a dividend is paid in cash. It may be provided that it is to be paid in stock of the company. In such case, it is spoken of as a Stock Dividend.

Bonds or Debentures

65. A company, like an individual, may have occasion to borrow money. In doing so, the individual may often give his promissory note—while the company is said to issue Bonds or Debentures. The latter may present a very elaborate appearance when contrasted with an ordinary promissory note, but they are essentially the same. They are promises of the company to pay a certain sum at a certain time, and at regular intervals to pay interest.

The term "Debentures" or "Debenture Bonds" is more generally used in referring to the promise issued by a public corporation, such as a city—but some public utility corporations, such as electric power companies, issue them. In such cases they are invariably preceded by first mortgage bonds. When debenture bonds are issued by a public utility company or other private corporation, it will be on the strength of a well-assured earning power. When debenture bonds are

issued by public corporations, such as the Dominion government, province, or municipality, the real security is the tax power of the corporation. There is no mortgage on specific assets given as security for debenture bonds

The term "Bonds" or "Mortgage Bonds" is more generally used in referring to promises issued by a private corporation such as a Joint Stock Company. These bonds are secured by a mortgage on specific assets in much the same way that an individual might give a mortgage on his house as security. Both forms have the bond feature, i.e., the promise to pay—but mortgage bonds have the additional feature of the pledge of specific assets.

66. The Registered Bond has its ownership registered in the books of the issuing corporation. If it is transferred by the holder, it must be done by changing the registration so as to substitute the name of the new owner. If the bonds are fully registered, interest will be paid by cheque issued to the registered holder of the bonds. If the bonds are registered as to principal only, interest coupons will be attached. The holder of the bonds clips the coupons when they fall due and presents them at his bank for payment.

67. The great majority of bonds are not registered and are freely negotiated. The bond is payable to bearer. As in the case of bonds registered as to principal only, interest coupons are attached to the bond and the holder of the bond collects his interest by clipping the coupons and presenting them at his bank. When the bond falls due, it will be presented at the bank in the same manner for the payment of the principal. Bonds with interest coupons attached are sometimes referred to as Coupon Bonds to distinguish them from fully-registered bonds.

Transfer of Shares

68. The following general principles govern the transfer of shares—

(*a*) Fully paid shares in a public company are personal estate and may be transferred in the manner prescribed by the Act of Incorporation, Letters Patent, or By-laws (or Articles of Association).

(*b*) It is one of the characteristics of a private company that the right to transfer shares is always restricted. Usually the provision inserted in the Charter (or Memorandum of Association) is that the shares may not be transferred without the consent of the directors.

(*c*) A transfer is invalid (except for the purpose of exhibiting the rights of the parties and of making transferor and transferee

jointly and severally liable to the company and to its creditors) until it is registered in the books of the company. Transfers made by sale under execution or judgment or order of the court are excepted.

If a writ of execution is issued to seize shares held by any person or if action is going to be taken in the court relative to shares, notice should be given to the company or a caveat or caution lodged with it so that no transfers may be made pending the outcome of the action.

(*d*) Shares not fully paid up cannot be transferred without consent of directors.

(*e*) If the directors permit a sale of shares not fully paid up, to a person apparently unable to pay them up, the directors incur personal liability.

(*f*) Shares with calls thereon in arrears are not transferable, generally.

(*g*) Directors may refuse to allow the transfer of fully-paid shares belonging to a shareholder who is indebted to the company, if the charter or by-laws grant such power.

Share Warrants

69. Share Warrants are not in common use in this country. They had their origin in Europe and the idea would seem to be to make the transfer of shares as easy as possible.

The Dominion Companies Act and most of the Provincial Companies Acts make provision for the issue of share warrants—but only with respect to fully paid up shares. The warrant is simply a certificate, under the seal of the company, stating that the bearer of the warrant is the owner of the shares mentioned in the warrant.

Thus, if A is the holder of a stock certificate for one fully-paid share in a certain company, he may turn in the certificate and ask for a share warrant. He may transfer this share warrant in the same manner that he would transfer a Bank of Canada one-dollar note; namely, by simply delivering it to the buyer. No registration of the transfer of a warrant is required.

It follows that the company may not know from day to day who is the owner of the stock represented by the warrant and no privilege of voting is given to a warrant holder. If the warrant holder desires to appear at a meeting of the company and to exercise the usual voting privilege of a shareholder, he must first turn in the warrant, secure the stock certificate that it represents, and have his name entered on the register of shareholders.

To facilitate the payment of dividends, coupons are generally attached to the warrant so that the holder of the warrant, at the time the dividend is payable, may get the dividend by detaching the coupon and presenting it.

Dominion vs. Provincial Incorporation

70. Some companies must obtain Dominion incorporation. By way of illustration, we mention Banks; Railways, where the line traverses more than one province; Steamship Lines, where the operations extend beyond the limits of a province. In other cases, a choice would seem to be open. Perhaps a discussion of provincial rights and a contemplation of the scope of the business may serve to indicate which incorporation should be sought.

A company incorporated in one province transacts business in another province at its peril unless licensed to do so. Unless it obtains a licence, such company may be debarred from the courts of such other province and thus fail in an endeavour to enforce contracts or collect debts. The different provinces have statutes governing extra-provincial companies and requiring such companies to take out a licence and to pay a tax or fee for the licence.

No province can prohibit a company with a Dominion Charter from doing business in such province, nor can a province force a Dominion company to take out a licence or to pay a tax or fee for operating in the province. Of course, if the province is in the habit of taxing or levying a fee on all companies operating in the province, then the Dominion company must pay with the rest, but not in excess of the rest.

71. One of the powers conferred by Dominion or Provincial Charter is the right to acquire and to hold land. In most of the provinces, an extra-provincial company which takes out a licence to do business acquires under that licence the right to acquire and to hold land. Otherwise it must be understood that, under what are known as Mortmain Acts, companies may be prohibited from acquiring or holding land unless specially licensed to do so.

We have noted above that a company with a Dominion Charter is not obliged to take out a licence to do business in any of the provinces. Thus it comes that, in some of the provinces, a company with a Dominion Charter must take out what is known as a licence in mortmain if it would acquire and hold land.

Termination of Corporate Existence

72. Under certain of the Acts a company may go out of existence (*a*) by surrender of charter (or certificate of incorporation), (*b*) by

forfeiture of Letters Patent (or certificate of incorporation), (*c*) by failure to carry on business, (*d*) by being wound up.

A company may be wound up (*a*) when solvent, (*b*) when insolvent. A company may desire to be wound up when in a solvent condition because, for instance, it has completed the work for which it was formed. Each of the provinces has what is termed a "Voluntary Winding-up Act", under the provisions of which solvent provincial companies may be wound up.

The Dominion Parliament has exclusive power in passing insolvency legislation. We have the Dominion Winding-up Act and the Dominion Bankruptcy Act.

The Dominion Winding-up Act makes provision for the winding up of insolvent banks, insurance companies, loan companies, and building societies, as well as trading companies. Solvent Dominion companies also may be wound up under this Act.

Before the Dominion Bankruptcy Act was passed all insolvent trading companies were wound up under the Dominion Winding-up Act. Since the Bankruptcy Act came into effect, proceedings to wind up insolvent trading companies will be commenced under it. There is a provision, however, in the Bankruptcy Act under which, on application of the company or the creditors, the court may permit the winding-up of insolvent trading companies under the provisions of the Dominion Winding-up Act. It is not often that resort is had to this provision. In all other cases it will be understood that insolvent trading companies—as well as insolvent partnerships and insolvent individuals—are wound up under the Dominion Bankruptcy Act.

Examination Questions

COMMERCIAL LAW

Lesson 10

1. By discussion and example, show the difference between guarantee, suretyship, indemnity, and primary liability.

2. Discuss the matter of sufficient consideration as it relates to contracts of guarantee and suretyship. Deal with cases where the contract of guarantee and suretyship is made at the time of the sale and cases where it is made after the sale.

3. Discuss the bearing of the Statute of Frauds on a contract of guarantee and suretyship, and state whether or not the statute applies to contracts of indemnity.

4. Mention seven ways in which a contract of guarantee and suretyship may be discharged.

5. What do you understand by a corporation? Give some illustrations of different kinds of corporations.

6. What is the predominant Canadian idea of a Joint Stock Company?

7. What characteristics distinguish a Limited Liability Company from a Partnership?

8. What different sources have we in Canada of Joint Stock or Limited Liability Company Law? What different methods are there of incorporation?

9. Three persons in, say, your province, have decided that they would like to form a Joint Stock Company for the purpose of conducting a chain store business in the province.

   Give a general outline of the procedure they would follow in securing incorporation.

10. Does the issue of Letters Patent (or Certificate of Incorporation) incorporating a company necessarily give the company power to go ahead with its business? Explain.

11. Contrast a Partnership with a Joint Stock or Limited Liability Company with regard to the right of members to participate in the management of the business.

(Continued on next page)

12. Distinguish between the two sets of books or records required to be kept by Incorporated Companies. In your discussion have regard to who may inspect any or all of the books and records.

13. Define the following terms: Dividend, Reserve Fund, Limited Liability, Authorized Capital, Paid-up Capital, Watered Stock, Preferred Stock, Stock Dividend, Debenture Bonds, Mortgage Bonds.

14. What facts must be weighed in deciding whether it is better to seek Dominion incorporation or Provincial incorporation?

15. What is the general import of Mortmain Acts?

16. Discuss the possible liability of shareholders of a Canadian Chartered Bank in the event of a bank becoming insolvent.

COMMERCIAL LAW

Lesson 11

WILLS

Terms Defined

1. A will is a document in which a person gives directions for the disposal of his property after his death.

The testator is the one making the will. He must be of the age of twenty-one years, unless a sailor or a person on active war service, and of sound mind.

A legatee is one who receives personal property under a will.

A devisee is one who receives real property under a will.

A codicil is a paragraph adding to or changing some of the provisions of the original will.

Probate is the official proving of a will which is done in the Surrogate Court.

An executor is a person appointed by the testator, in his will, to carry out the terms of the will.

An administrator with will annexed is a person who is appointed by the Court to carry out the wishes of one who has died leaving a will but has not named an executor, or names one who refuses to act.

An administrator is one who is appointed to settle the affairs of a person who dies without leaving a will.

Intestacy is the state which exists where a person dies without leaving a will or, in other words, dies intestate.

Form of Will

WILL

I, JOHN R. BAKER, Esquire, of the City of Guelph, in the County of Wellington, and Province of Ontario, do make my last Will and Testament in manner and form following:

1. I hereby revoke any former wills by me at any time heretofore made.

2. I direct all my just debts, funeral and testamentary expenses to be paid and satisfied by my executor, hereinafter named, as soon as conveniently may be after my death.

3. I give, devise and bequeath to my wife, Anna, one-half of all my property, real and personal, of what nature and kind whatsoever and wheresoever the same shall be at the time of my death; the same to be in lieu of her dower.

4. I give, devise, and bequeath unto such of my children as may be living at the time of my death, one-half of all my property, real and personal, of what nature and kind whatsoever and wheresoever the same shall be at the time of my death, to be divided among them share and share alike.

5. I hereby appoint Joseph M. Baker executor of this my last Will and Testament.

IN WITNESS WHEREOF, I, John R. Baker, *the testator*, have to this my last will and testament, set my hand, this eleventh day of July, A.D. 1948.

JOHN R. BAKER.

SIGNED, PUBLISHED AND DECLARED by the said Testator as his last Will and Testament in the presence of us both present at the same time who in his presence and in the presence of each other have subscribed our names as witnesses at his request.

ALBERT B. MILLER,
Barrister-at-law,
Guelph, Ont.

DAVID SMITH,
Student-at-law,
Guelph, Ont.

Making Changes in Will

2. A codicil may be satisfactory if very few alterations in the will are desired. If many alterations of the provisions of the will are to be made, the testator will be better advised not to depend on a codicil but to make a new will and destroy the old one. A codicil must be signed and witnessed in the same way as the will itself. It should state clearly that it is a codicil, and should make definite reference to the will to which it refers. A codicil should be drawn in a manner that will avoid any confusion with the terms of the will which it supplements. Thus, if it gives a legacy to a person to whom a bequest is provided in the original will, the codicil must state very clearly whether or not the legacy named in the codicil is in addition to the former legacy. If the codicil does not state that the legacy provided for in it is in place of a legacy to the same person provided for in the will, the legatee is entitled to both legacies.

The operation of law may revoke the will—as where the testator marries after making the will, unless the will states that it was made in anticipation of such particular marriage.

Drawing, Signing, and Witnessing (Execution)

3. Generally speaking any one may write a will—that is, the

testator may write it himself or he may appoint any person to write it for him. After being written it should be witnessed by at least two persons not under 21 years of age, and the witnesses and the testator must all sign in the presence of each other.

If a legatee or a devisee were to sign a will as witness it would not make the will invalid—but the bequest to such person would be void. A bequest to the wife or husband of the person signing as witness to a will is also void.

An executor may be a legatee or devisee.

It is not necessary to attach a seal to a will, although it is sometimes done.

4. To the foregoing, there are these exceptions. Persons on active war service and sailors at sea may dispose of their effects by simply signing a written statement of how they wish to dispose of their personal property. In Quebec there are three forms of wills: First, the notarial form or, as it is called, the authentic form which is made before two Notaries or before one Notary and two witnesses of the male sex and of full age; it need not be probated. Second, the English form which any person can write but which must be probated. Third, the holograph will which is one wholly written and signed by the testator; it needs no witness, but must be probated. This last will is also valid in Manitoba, Alberta, and the North-West Territories.

Probate

5. The above will show that in some cases probate of the will is necessary in Quebec. In the other provinces, it is necessary to probate a will in order to obtain and administer the assets of a deceased person. The will should be proved in the Surrogate Court, as the probate clothes the executor with legal authority to administer the affairs of the estate and, if necessary, to enter the Courts.

Executors

6. The executors represent the deceased in settling the affairs of his estate and in distributing the proceeds among those entitled to share according to the instructions of the will. An executor named in the will may refuse to act, in which case it may be necessary to appoint an administrator with will annexed. Also, if an executor is found to be wasting the estate or committing acts of injustice to the heirs, he may be removed by proceedings in the Surrogate Court.

Liability of Executors

7. An executor or administrator should publish a proper notice calling for all claims against the estate to be proved and filed by a

certain date. The notice should state also that after such date the estate will be distributed, having regard only to such claims as have been filed. If the executor or administrator acts according to the terms of the notice and claims are filed later, no action can be taken by the creditors against the executor or administrator personally. This, however, does not prejudice the right of such creditors to follow the estate among those receiving it, and the courts would determine their rights as against the beneficiaries.

To allow a debt due to the estate to outlaw would be considered culpable neglect, and the executors would be held personally liable.

On the other hand, it is held generally (except where by the Law of the Province the debt is extinguished) that an executor is justified in paying an outlawed debt for the good name of the deceased—unless the court has officially declared the debt barred. As the executor is not bound to pay the debt, the consent of the beneficiaries may be desirable.

Investments by Executors

8. If an estate is to be invested and the form of investment is left to the discretion of the executors or trustees, they should invest only in securities authorized under the Act respecting trustee investments, unless the will expressly states that the executors can invest in securities not mentioned in the Trustee Act. This would also be the case if nothing is said in the will as to the nature of the investments.

Remuneration of Executors

9. The executors are entitled to a fair percentage of the proceeds of the estate as compensation for their time and labour. There is no fixed tariff of fees, but 5 per cent will generally be the maximum allowed them. An administrator's duties are exactly like those of an executor. He must, however, give a bond for the due performance of his trust, while an executor need not do so.

Discharge of Executors

10. When an estate has been distributed and the debts of the deceased paid, the executors may obtain a release from each person receiving a bequest or share of the estate. This release constitutes a legal discharge of the executors from future personal liabilities. A more usual method is for the executors to have their account passed before the Surrogate Judge, and for him to approve of the same and fix the amount of the executor's compensation.

11. Where a trust is vested in two or more trustees jointly, it may be exercised by the survivor or survivors of them for the time being.

General and Specific Legacies

12. A General Legacy is one that does not earmark any particular thing but which is to be provided out of the testator's general estate. If such a legacy is to be made out of some particular fund the legacy would not lapse if, at the death of the testator, that particular fund was insufficient to provide the legacy.

A Specific Legacy is a gift of a definite object or a distinct part of the property. If the property should be insufficient to meet all the legacies a specific legacy would not be affected, while the general legacies would be reduced.

The liabilities of the estate will be met out of other assets than the one named in the specific legacy—but if such property is insufficient to meet the liabilities, the property named as a specific legacy would be drawn on then.

A specific legacy may be revoked during the lifetime of the testator. If the testator should sell the property or if it is destroyed, the specific legacy would be revoked. The property specified as a specific legacy must form a part of the estate at the time of the death of the testator if the legacy would be effective.

If certain property is to be sold and the proceeds divided into certain shares the legacies are specific, just as is the case if a gift is made out of certain money or consists of a certain stock. The stock must be specified if the legacy would be specific.

A legacy of personal property is termed a bequest. On the other hand if the property were in land, it would be a devise.

Should it be found that at the death of the testator a specific gift did not exist as part of the estate, either because of sale or destruction or having been changed into something else, the specific legacy is said to be adeemed or abrogated, the process being referred to as ademption or abrogation.

Distribution of Estates of Intestates

13. If a person dies without making a will, he or she is said to die "intestate". As he or she has made no provision for the division of the estate it is necessary for this provision to be made by law.

As there is no will (and so no one appointed to execute the terms of the will), it is necessary for the Court to appoint someone to administer the estate. Such a person is termed the "administrator" and his duties will be similar to those of an executor, except that he will divide the estate according to law and not according to the instructions of the deceased.

When an executor is appointed by will it is assumed that the testator has confidence in him, so he is not required to give a bond. An administrator is required to give a bond, and in some provinces this bond must be for twice the value of the estate.

The law that applies to intestate estates sets out the devolution of the estates of intestates. The division is made according to the relationship of the heirs to the deceased. A great many different conditions may arise in this connection, but reference will be made to some of the more usual only.

If a person dies intestate, that is without a will, the division of the estate will be made according to the law of the province. The real estate will descend according to the law of the place where the land is situated, while personal property will be distributed according to the law of the place where the deceased was domiciled at the time of his death. This reference to personal property applies to distribution among those who succeed, but the administration and collection of the estate are governed by the law of the place where the property is situated.

Wife Only and No Issue

British Columbia.—The wife will take $20,000.00 or the whole of the estate, whichever is less, and one-half the balance. The other half of the balance will be distributed as if there were neither wife nor children, that is, to the father and mother equally, or all to the father or mother surviving. If neither father nor mother is living, this balance will go to brothers and sisters equally with children of deceased brother or sister taking their parent's share. If there are no brothers and sisters but nephews and nieces, this balance will be divided among them equally. If there are no nephews and nieces, this balance would go to the next of kin in equal degree of relationship to the intestate.

Alberta.—All to the wife. (Subject to Intestate Succession Duty Act, 1928.)

Saskatchewan.—All to the wife.

Manitoba.—All to the wife.

Ontario.—Entire estate where the net value does not exceed $5,000.00. If it exceeds $5,000.00, she is entitled to $5,000.00 and interest at 4% from date of death until payment, and two-thirds of the residue. The balance of the residue to the next of kin, or if no next of kin to the Crown.

Quebec.—All to the wife if there is no father or mother and no collateral relations up to nephews and nieces in the first degree. If there should be a father or mother, etc., special provisions of the Quebec Code will apply.

New Brunswick.—The wife will take $20,000.00 or the whole of the estate, whichever is less, and one-half of the balance. The other half of the balance will go to the next of kin.

Prince Edward Island.—The wife has dower rights only in the land and will take half of the personal estate with the balance going to the next of kin.

Nova Scotia.—Half to the wife and the other half to the parents equally or one-half to the surviving parent. If the parents are both dead, to the brothers and sisters with the children of a deceased brother or sister taking their share by representation.

Husband Only and No Issue

The estate will devolve in the same manner as explained when the deceased leaves a wife only and no issue (except that the husband takes the place of the wife) in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, and Nova Scotia.

In Ontario the husband will receive one-half of the estate and the other half will be applied as though the husband had predeceased his wife, i.e. equally among next of kin of wife. A husband entitled to curtesy may, by deed or instrument in writing, elect to take curtesy instead of a distributive share of the estate provided he gives the deed or instrument within six months of his wife's death.

In Prince Edward Island all personal property goes to the husband and, subject to curtesy, land goes to the heirs as if there were no husband living.

Leaving Wife and Child or Children

In British Columbia, Alberta, Saskatchewan, Manitoba, Ontario and New Brunswick, if there is a wife and one child, each takes one-half. If more than one child, the wife takes one-third and the balance goes to the children. If there are children of a deceased child, they will take their parent's share by representation. If any child had received an advance on account of his or her share during the lifetime of the deceased, his or her share will be reduced by the amount of the advance.

In Ontario, if there is a wife and one child, the wife will receive $5,000.00 and interest together with one-half of the residue. The other one-half of the residue will be given to the child or to the legal representative thereof. If there is a wife and children, the wife will receive $5,000.00 together with interest thereon, and one-third of the residue. The children or their legal representatives will receive two-thirds of the residue.

In Quebec, one-third would go to the wife and two-thirds to the child or children in equal shares if more than one child. The issue of

any deceased child takes the share of the parent by representation. There are special conditions to be met under the Quebec Code where there has been community of property. The surviving consort is excluded from the succession when the deceased consort dies before having reached his or her majority.

In Prince Edward Island, subject to dower, all the land goes to the children. One-third of the personal estate goes to the wife and the balance to the child or children with the issue of a deceased child taking their share by representation. Advances made during the lifetime of the deceased to a child will reduce the amount to which he or she is entitled.

In Nova Scotia, two-thirds goes to the child or children with the issue of a deceased child taking by representation. Advances made during the lifetime of the deceased to any child will be deducted from his or her share. A wife has dower rights in the land and also in one-third of the personal property.

Leaving Husband and Child or Children

In British Columbia, Alberta, Saskatchewan, Manitoba, and New Brunswick the division will be the same as outlined when the deceased left a wife and child or children.

In Ontario, the husband receives one-third and the child or children two-thirds, with advances made to any child during the lifetime of the deceased deducted from his or her share.

In Quebec, the husband receives one-third while two-thirds goes to the child or children in equal shares if more than one child. Special provisions of the Code when there has been community of property will apply here also.

In Prince Edward Island, subject to curtesy, all the land goes to the children. One-third of the personal estate will go to the husband and the balance to the children with the issue of a deceased child taking the parent's share by representation, and any advances made during the lifetime of the deceased being deducted.

In Nova Scotia the husband receives one-third of the personal property as well as his rights as tenant by curtesy in the real property. The balance goes to the child or children with the issue of a deceased child taking their share by representation, and advances made during the lifetime of the deceased deducted.

Leaving Wife and Mother

In British Columbia and New Brunswick, the wife will receive $20,000.00, should the estate reach that amount, and half of the balance, with the other half going to the mother.

In Alberta, Saskatchewan, and Manitoba, the wife will receive the whole of the estate.

In Ontario, the wife receives $5,000.00 and interest and two-thirds of remainder; residue to mother.

In Quebec and Nova Scotia, the wife and mother each receive one-half.

In Prince Edward Island, subject to the dower rights of the wife, the mother takes the real property, while the personal estate is divided equally between the wife and mother.

Leaving Wife and Father

This is similar to the case of wife and mother just described.

Leaving Wife and Brother or Sister

The property will be divided in the same manner as that set out in the case of wife and mother, and wife and father.

Leaving Wife and Brother and Sister

The division will be made in the same manner as when the deceased left a wife and brother or sister, except that the brother and sister will between them receive the same amount as was given to the brother or sister.

Leaving a Wife, Brothers or Sisters and Children of Deceased Brothers or Sisters

The provisions will apply as in the case of leaving a wife and brother or sister, but children of deceased brothers or sisters will take their deceased parents' share by representation.

Leaving Wife, Mother, Brother or Sister

In British Columbia and New Brunswick, wife will receive $20,000.00 or the whole of the estate, whichever is less, while the balance will be divided between the wife and mother equally.

In Alberta, Saskatchewan, and Manitoba, the wife receives all.

In Ontario, the wife receives $5,000.00 and interest and two-thirds of the balance, the other one-third being given to the brother or sister and mother equally.

In Quebec, the wife receives one-third, while the brother or sister and the mother likewise each receive one-third.

In Prince Edward Island, subject to the dower rights of the wife, the land will be divided among the mother, brothers and sisters equally. The personal property will be divided one-half to the wife and the other half to the mother, brothers and sisters equally.

In Nova Scotia, the wife will receive one-half of the estate and the mother the other half.

Leaving Wife, Mother, Brothers or Sisters and Nephews or Nieces

In British Columbia and New Brunswick, the wife will receive the estate up to $20,000.00 and the balance will be divided half each to the wife and mother.

In Alberta, Saskatchewan, and Manitoba, the wife receives all.

In Ontario, the wife receives $5,000.00 and interest and two-thirds of the balance. The residue will be given to the mother, brothers or sisters, while nephews and nieces will take the share of their deceased parent by representation.

In Quebec the wife receives one-third, as does also the mother, while the other one-third will be given to the brothers or sisters with the nephews or nieces taking the share of their deceased parent by representation.

In Prince Edward Island, subject to the dower rights of the wife, the land will be given to the mother, brothers or sisters, with the nephews and nieces taking their share of the deceased parent by representation. The wife will receive one-half of the personal property while the other half would be divided among the mother, brothers or sisters equally, with the nephews or nieces taking their deceased parent's share by representation.

In Nova Scotia the wife and the mother will receive one-half each.

Leaving Children by Two Wives

In all the provinces the children will divide equally.

Leaving Father and Mother

In all the provinces each parent will receive one-half.

Leaving Father Only or Mother Only

The parent will receive the full amount.

Leaving Mother and Brother

In British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia, the mother will receive all.

In Ontario, Quebec, and Prince Edward Island, the mother and the brother will each receive one-half.

Leaving Mother, Brother and Sister

In British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia, the mother will receive all.

In Ontario and Prince Edward Island, they will divide equally

In Quebec, the mother will receive one-half while the other half will be divided equally between the brother and sister.

Leaving Father, Mother, Brother and Sister

In British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia, the estate will be divided equally between the father and mother.

In Ontario, it will be divided equally among all.

In Quebec, the father and mother receive one-half of the estate and the other half is given to the brother and sister.

In Prince Edward Island the father receives the full amount of the estate.

Leaving Brothers and Sisters Only

The brothers and sisters will divide equally. Should there be a posthumous brother or sister, he or she will share with the others.

Leaving Grandparents

The estate is divided equally.

Leaving Brother or Sister and Grandfather

The brother or sister will receive all.

General Notes

There are, of course, other relationships for which provision is made in law, but what have been given are some of the most important and will give a general idea of the work of the law relative to the devolution of the estates of intestates.

Where an estate is divided equally among a number of individuals, such as brothers and sisters, they are said to share *per capita*, that is each person is a unit.

In case a brother or sister has died leaving children, the children of that deceased brother or sister taking the share of their deceased parent by representation, or *per stirpes*, this means that they together receive one share, representing as they do the deceased parent who would have been entitled to that share. Thus if there were four children and their deceased parent would have been entitled to $4,000.00, they would receive $1,000.00 each.

The term "curtesy" refers to the right of a husband whose wife inherited land, and where a living child has been born, to keep the

land during his life if his wife were in possession of the land at the time of her death. The husband surviving is called a "tenant by curtesy". This is a common law right and exists except where it has been abrogated or modified by statute.

"Dower" is the right which a widow has for her lifetime to one-third of the lands to which her husband was beneficially entitled at the date of his death. It should be kept in mind that dower does not give the widow any title to the land. She is entitled to its use or the income derived therefrom.

BAILMENT

14. Reference has been made in an earlier section of this course to bailment, which involves a transfer of possession without a transfer of title.

Bailment may be "gratuitous" or it may be "for value". In gratuitous bailment would be included the handing of an article to another party who has simply to keep it without any reward and return it on demand. If a person goes into a restaurant and hands his coat to the waiter, that would be an example of gratuitous bailment. If the article is not forthcoming when demanded the bailee, that is the party holding it, must show only that he exercised the same reasonable care as he would with his own property. For the bailor (owner) to recover damages, it is necessary that he prove negligence or breach of orders.

Where an article is left with another party who is to do something to it without reward, there is gratuitous bailment that is termed "mandate". The contract is not enforceable as there is no consideration—but if it is undertaken the bailee must exercise care in its custody and must use his skill in the work he is to apply to it. If he fails to do so, he is liable for negligence.

The third form of gratuitous bailment is that of "loan" of a chattel to the bailee for his own use. The bailee is liable for negligence but not for ordinary wear and tear.

It will be observed that the first two forms to which reference has been made are for the bailor's benefit, while the third is for the benefit of the bailee. The bailee is not liable if some third person damages the article, nor for d mage that he could not foresee nor prevent, nor for damage from violence. He must not use the chattel for any other purpose than that intended when he borrowed it. If he does, he becomes an insurer.

Perhaps we are more concerned about "bailments for value". Examples of these are—

(*a*) Pawn, where the bailee holds the chattel for security for a loan or for a debt;

(*b*) Hire, which would include storage, hire for use, hire with an option to purchase, hire of work on a chattel, and hire of carriage (common carriers) of a chattel.

Hire for Storage

In the case of storage the bailee contracts, for a price, to use ordinary care in keeping the chattel. He is not liable beyond that, but he is responsible for negligence or fraud on the part of his agents or servants in the course of their employment. Should the chattel be lost or damaged, it would be necessary for the bailee to prove that he was not negligent. He is not responsible for a loss through fire unless he has made himself so under the contract. The bailee is not an insurer.

Hire for Use

If a person hires an article for use, it is the owner's responsibility that the article is suitable for the work for which it was hired and is in condition for such work. There would be an implied warranty to that effect so that if loss or damage occurs, because of some defect of which the owner should have been aware, he is liable for consequences. He is not liable however for hidden defects, and the hirer must prove negligence.

The hirer is liable for the price to be paid, even if he returns the chattel before the expiration of the period for which he was to keep it—unless the owner agrees to accept a lesser amount.

The hirer must take reasonable care of the article, but is liable only for damage through his negligence or that of his employees. Unless it is provided in the agreement, he is not liable for ordinary wear and tear nor for repairs not made necessary by his negligence. Should he make repairs to the article he should have the authority of the owner—or he cannot claim for their cost.

Hire with Option to Purchase

There are many cases where articles are sold under an agreement to pay by instalments, with the title remaining in the vendor until the payments are completed. It is usual in such contracts to provide that if there is default in payments the owner may retake possession.

Hire of Work on a Chattel

If an article is given to another for repairs and no price is agreed upon the party giving it (the hirer) must pay a reasonable price. If, however, the work is not of a proper standard and the party giving the article for repair gets no benefit, the party making the repairs cannot recover.

The hirer is bound to pay for all the materials necessary for the repair.

If the repairs are not completed and there is no agreement that calls for completion, the hirer will be liable to pay for what is done. If, however, the workman has entered into a contract to complete the repairs specified, he cannot recover until he has completed that which he contracted to do. He cannot recover for extras unless the owner agreed to pay for them.

If the person making the repairs holds himself out as one capable of doing such work he warrants that he has the skill and if, through negligence or because he lacks the skill, the work is unsatisfactory he cannot claim remuneration and is liable for losses.

The party making the repairs must take ordinary care of the article and he must return it at the time stated. Failure to do so will render him liable for damages. If the article is lost or damaged, it is necessary for him to show that he was not negligent.

Hire of Carriage of Chattels

If anyone carries goods for another for accommodation and without charge, he is liable for damages only if he is guilty of gross negligence.

Those who do not make a business of carrying goods, but do so occasionally and accept pay, are liable for loss caused through their carelessness or common negligence.

The above are not considered common carriers.

Common carriers for hire include railways, express companies, steamboats and vessels, draymen, transfer companies, etc. It is with this group that we are concerned particularly.

If a vendor ships goods to the purchaser in the latter's name and the way-bill is delivered to the common carrier or wharfinger, the goods are deemed to be in the possession of the purchaser—and the carrier or wharfinger in that case is the agent of the purchaser. This does not mean that the buyer has accepted the goods. He still has a right to refuse the goods.

If the vendor ships the goods in his own name, the carrier is agent for him.

In order to establish damages, it is necessary to show that the carrier received the goods in apparent good condition but they are not in good condition on delivery.

TRADEMARKS

15. Many products become known to the public and identified by them as to quality by a definite name associated with them. Producers who apply these names to particular products or to their products in general must necessarily protect themselves against other producers using the same name for their products. If they do not protect themselves any benefit attached to the name would be destroyed.

The exclusive right to use a particular name or design in marking or identifying goods is obtained by registering the name or mark under the Trademark and Design Act of the Dominion.

The idea of the trademark is that it is something which marks certain products, or the product of a certain producer, or the products in general of a certain producer. Unless the trademark is registered there will be nothing to prevent other producers from using the same name or distinguishing mark. When the name or mark is registered, the party who holds the right could take action against another who imitates it or who uses it to indicate that his goods are the same quality as those of the producer who registered the mark.

A trademark may be either general or specific.

In the case of a general trademark, the name or design is used for all the articles which a person produces or in which he deals.

In the case of a specific trademark, the name or design is confined to a particular class or kind of goods. It may be a particular kind of breakfast food, such as grapenuts, or it may be any other particular commodity.

To give some idea of the breadth of the law concerning trademarks, it is interesting to observe that there may be registered as trademarks (whether general or specific) all marks, names, labels, brands, packages, or other devices adopted by a person for use in his business with a view to distinguishing his products from those of other producers.

If a label is registered as a trademark, it must be distinctive. It is in this way only that it could be exclusive.

A person may apply to have a trademark registered before he uses it, that is it is not necessary to use it first—although of course this could be done.

The point for consideration if another person should apply to register a trademark or a similar product with a similar name, will be as to whether this would conflict with one registered already and so deceive the public. If it would not, the registration would be in order.

Unless a trademark is registered, action could not be taken against another if he infringe it.

The application for registration is made in duplicate to the Commissioner of Patents (Trademark Branch), Ottawa, Canada. The application must state whether the desired registration is for a general or a specific trademark, and it must be accompanied by drawings and descriptions.

In the case of a general trademark that has been registered, there is no time limit as to its operation. In the case of a specific trademark which has been registered, the registration is good for twenty-five years, but may be renewed for like periods by the proprietor or his legal representatives.

The registration of a trademark has the effect of giving the proprietor of it the exclusive right to use that trademark. If any other person should attempt to use it action may be taken to stop him, and he may be liable in damages if he has used it.

A registered trademark may be assigned and the assignee may register the assignment, although it is not necessary that this be done.

In the case of the death of the owner of a trademark the rights pass to his personal representatives, who may use it or sell it. It may be disposed of by will. In the case of a partnership, a trademark would constitute one of the assets of the firm and, if the firm is dissolved, the trademark follows the goodwill in case the business is sold.

If the owner of a trademark becomes bankrupt, the trustee in bankruptcy has power to dispose of the trademark.

The law in Newfoundland relative to trademarks, both general and specific, is practically the same as that of Canada. In Canada a distinction is made between trademarks and industrial designs, but in Newfoundland this distinction is not made.

The trademark may be registered in Newfoundland for particular goods or for a class of goods, as in Canada, and the design may be in any colour or combination of colours.

PATENTS

16. If a person invents anything that is new and useful, whether it be a process or a machine or a new and useful improvement of something existing already, he cannot obtain the full benefit from his invention unless he has the right to restrain others from producing

and using that which he has invented. The Dominion Patent Act gives this protection to inventors. If the patent is issued it gives exclusive ownership of the invention to the party to whom it is issued, provided that the article or process was not known or used by others before the claim is made of a new invention.

The term "patent" means that letters patent have been issued establishing the fact that whatever is patented is recognized as a new invention, and establishing the right of the inventor to control his invention.

The Patent Office is attached to the Department of Secretary of State of Canada, and a Commissioner of Patents performs and exercises the powers and duties imposed under the Patent Act.

The public use by the patentee of his invention for more than two years before he applies for a patent will defeat his patent. The fact that a previous inventor may have made tests does not constitute public use. If an invention was previously used in public or in the presence of others who are not bound to secrecy, and it was used for ordinary trade purposes, this constitutes prior public use and will defeat a subsequent application for a patent.

The Government of Canada may use any patented invention, but will pay to the patentee whatever reasonable compensation is decided by the Commissioner or by the Exchequer Court on appeal from the Commissioner.

Every patented article must, if possible, have stamped or engraved on it a notice of the year of the date of the patent applying to the article. When it is impossible to do this, and the article is packaged, a label marked with the date must be affixed to the package. If it is impossible to indicate on the article itself or otherwise, the fact must be mentioned in all descriptive or advertising matter relating to the article.

Any person who has invented an improvement on an invention already patented may obtain a patent for such improvement, but this does not give him the right of making, selling, or using the original invention. Likewise, the patent for the improvement does not give the original inventor the right of making, selling, or using the patented improvement.

On applying for a patent it is necessary that the title or name of the invention shall be submitted with the application—together with specification in duplicate and also full description, including the steps in a process or the method of construction, etc.

If the invention is of a machine, or of anything else that admits of illustration by means of drawings, the applicant for the patent must

send in drawings in duplicate properly signed—and in cases where the invention permits of representation by model, the applicant may be required to furnish a model.

When the Patent Office receives an application for a patent, a very careful examination is required by competent examiners before the patent will be issued.

The period for which a patent is issued is seventeen years from the date on which the patent is granted and issued, provided it is issued under the Act of 1935. If the application was filed prior to the coming into force of the Act of 1935, the period is eighteen years from the date on which the patent is granted and issued.

Patents either in whole or in part may be assigned in law by an instrument in writing. It is essential that the assignee of a patent register the instrument of assignment as early as possible. If he fails to do so and an assignment is made to another party who registers the instrument of assignment, the latter party will hold the rights in the patent. The assignment to the former party is void against the subsequent assignee because of failure to register.

An action for the infringement of a patent may be brought in the courts. Any person who infringes a patent is liable to the patentee for damages. This does not apply to a person who may have purchased, constructed, or acquired any invention before a patent covering it was issued.

The Commissioner of Patents may ask the patentee or his registered representative whether the patent is being worked on a commercial scale in Canada and, if not, the reasons why it is not being worked. If it is not worked for a period of three years from the date of the patent, steps may be taken to have it declared that there has been an abuse of the exclusive rights—and asking for relief. The abuse lies in the fact that the person holding the rights has not used the patent, while at the same time others have been prevented from doing so.

If a person is working on a new article or process which is not perfected he may file a caveat in the Patent Office giving a description of his invention, in order to protect his invention until such time as it is perfected and he is able to apply for a patent.

COPYRIGHT

17. Copyright refers to the exclusive rights in literary and artistic works. The purpose is to protect the author or owner against publication or use without permission. To express the idea more fully, copyright may apply to every original literary, dramatic, musical, and artistic work.

The term for which copyrights shall subsist, unless otherwise expressly provided by the Copyright Act, shall be the life of the author and a period of fifty years after his death. In the case of work of joint ownership, the copyright shall subsist during the life of the author who dies first and for a term of fifty years after his death, or during the life of the author who dies last—whichever period is the longer.

The term for which a copyright shall subsist in photographs is fifty years from the making of the original negative.

The owner of a copyright in any work may assign his right, either wholly or partially, and either generally or restricted to a limited area.

Should the owner of a copyright fail or refuse to publish or perform that which it covers, application may be made by any person for a licence to print or perform that which has been kept from the public through the copyright.

The licences are issued for a definite and limited term, and the licensee would be required to pay a royalty.

A copyright in a work is deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything which the owner has the sole right to do.

The Copyright Office is attached to the Patent Office. There is a Registrar of Copyrights.

The foregoing is intended to give a general idea only relative to copyrights. The Act governing copyrights contains details on many phases of the subject that are of interest in particular cases.

Examination Questions

COMMERCIAL LAW

Lesson 11

1. What formalities must be observed in the execution of a will? What effect is there on the will if the witness is an executor or is a beneficiary under the will? What effect, if any, has the subsequent marriage of the testator on a will made before marriage?

2. An executor of an estate wants one of the creditors of the estate to wait a little and, going to his store, says, "I wish you would not press for that claim just now. I promise I will pay it myself if the estate fails to do so". Can this be enforced against the executor?

3. An executor advertises for claims. After the time specified for the filing thereof has elapsed, he distributes the estate. Later a creditor who had not seen the notice filed his claim. Has the claimant any right against either the executor or the parties amongst whom the estate has been distributed?

4. Where three executors named in a will took out probate and later two of them died, what powers has the survivor?

5. (*a*) A is executor of the estate of B. C is a creditor of B's estate and threatens legal action against the estate for his claim. A, to prevent these proceedings, tells C that he (A) would be personally responsible for the payment of C's claim. On the settling of the estate, sufficient money was realized to pay 25 cents on the dollar of the creditor's claim.

   Can C succeed in an action against A for the balance of his claim? Give reasons for your answer.

   (*b*) A has made a loan of $10,000.00 out of B's estate to D, who had a very prosperous business with a stock worth $100,000.00 and, as security for the loan, D gave A a chattel mortgage on the stock. Some time afterwards D was burnt out with almost total loss, he having neglected to keep renewed the insurance on the stock. D had no other property.

   Can A be held personally responsible for the amount the estate lost by this loan? Give reasons for your answer.

(*Continued on next page*)

6. A, executor of the estate of B, by the terms of the will, is directed to convert the whole estate into cash, and after payment of the debts of the deceased to divide the residue among the wife and children of the deceased in equal shares.

A turns the estate into cash and, having found among the deceased's papers an unsigned document which purported to be a list of the deceased's creditors, he pays the debts referred to in this list. A then distributes the residue of the estate among the parties entitled thereto.

Shortly afterwards, C, a creditor of the deceased whose name did not appear on the list of creditors, filed his claim with A.

(*a*) Can C collect the amount from A personally? Give reasons for your answer.

One of the debts mentioned in the list is an account for goods ten years old on which a payment had been made seven years before the death of the deceased. A paid the amount of this claim.

Another debt referred to in the list is a Promissory Note which on its face carried interest at 10 per cent per annum until the maturity of the note. The note is three years overdue. A paid this note with interest at 10 per cent per annum up to the time he paid it, and also allowed interest on arrears of interest.

Another debt given on the list is a Promissory Note made eight years before the death of the deceased, payable at the expiration of three years from the date of the note. A paid this note also.

(*b*) How far was A justified in paying the account and the two notes assuming they are bona fide?

7. Discuss the different forms of wills, necessity of the witnesses and of the probate of wills.

8. (*a*) Define and explain the purpose of a codicil to a will. Refer to its form and the necessity for clearness in its content.

(*b*) In his will A bequeathed $15,000.00 to B. In a codicil A bequeathed $20,000.00 to B without any reference as to whether the latter bequest was made to take the place of the former. To how much is B entitled?

9. (*a*) Distinguish between General and Specific Legacies.

(*b*) In his will X left Y his car. Before his death X sold the car to Z. What is the legal position of the legatee?

(*Continued on next page*)

10. What do you understand by "Intestate Estates"?

11. A, of your province, died without leaving a will. He was survived by his widow and two children and also by two children of a deceased son. The estate (net) realized $100,000.00. Show how much each of the heirs should receive.

12. (*a*) Explain the terms: (i) "tenant by curtesy," and (ii) "dower".

    (*b*) A mortgaged his real property and B, his wife, barred her dower. A died intestate. The real property was sold for $15,000.00 while the amount of the mortgage, etc., was $10,000.00. Explain clearly the dower rights of B.

13. (*a*) What is "Bailment"?

    (*b*) Name and describe two kinds of bailment. Give examples and discuss the question of liability in each case.

14. What is a "trademark" and what is its purpose? How does it become effective?

15. What is a "patent" and what does it establish?

16. A applied for a patent covering an article that had been in public use for three years. May he obtain a patent? Explain what is meant by public use.

17. May the Dominion use a patented invention without special permission? If this is done, how is compensation arranged?

18. Discuss the position and rights of a person who invents an improvement on an invention already patented.

19. What is necessary to be done when applying for a patent?

20. For what period are patents issued?

21. How may rights in patents be transferred? What step should be taken by the assignee in order to protect his rights?

22. How may a person who is working on a new article or process protect himself pending the completion of his invention?

23. Explain the meaning and purpose of "copyright".

24. For what period is a copyright effective when issued? How does this apply in the case of joint authors?

25. A holds a copyright but fails to publish that which it covers. What steps may be taken by another person regarding publication?

26. When is a copyright deemed to be infringed?